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No. **632**.

STATE OF MISSOURI, UPON THE INFORMATION OF
ROY MCKITTRICK, ATTORNEY GENERAL OF THE
STATE OF MISSOURI, AT THE RELATION OF THE
CITY OF TRENTON, MISSOURI, A
MUNICIPAL CORPORATION,
PETITIONER,

VS.

MISSOURI PUBLIC SERVICE CORPORATION, A
DELAWARE CORPORATION,
RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI AND BRIEF
IN SUPPORT THEREOF.**

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:

Your Petitioner, the State of Missouri, upon the in-
formation of Roy McKittrick, Attorney General of the
State of Missouri, at the relation of the City of Trenton,

Missouri, a municipal corporation, respectfully shows as grounds for the issuance of a Writ of Certiorari to the Supreme Court of Missouri:

A.

Summary Statement of the Matter Involved.

This is a proceeding for the ouster of the Respondent from the maintenance and operation of an electric generating and distribution system operated and maintained by Respondent in the City of Trenton, Missouri, and supplying such service to a minor group of citizens of that municipality. This action is one of a number of proceedings which have been instituted in various courts involving directly or indirectly the operation and maintenance of this plant.

This litigation has continued over a period of many years. The Congress of the United States through the enactment of the National Industrial Recovery Act, Title II, determined that it was the policy of our Government to encourage the building and operation of municipal electric plants in those communities without them and in those communities wherein inadequate and unsatisfactory electric service was supplied at unreasonable and exorbitant rates. The City of Trenton, on behalf of its citizens, long suffering from poor and inadequate service and subjected to high and exorbitant rates, promptly proceeded to utilize the opportunities afforded by this legislation to obtain satisfactory and economical electric service by complying with the necessary formalities. Its citizenry voted *ad valorem* tax bonds in the amount of \$250,000 so as to obtain the necessary funds for matching a Federal grant of \$88,000 for the building of a modern and efficient electric generating plant and distribution system and proceeded with the letting of contracts to that end. After

the contracts had been partially executed, the Respondent in the instant case filed an injunction suit in the United States District Court for the Western District of Missouri, the object of which was to enjoin the City of Trenton from proceeding with the erection and operation of such plant and distribution system. Your petitioner herein, as one of its defenses to such action, alleged the invalidity of the Respondent's purported franchise, referred to as the "Jones Franchise," and contended that the Respondent herein was without right or authority to maintain and operate an electric generating and distribution system in the City of Trenton (R. 89). After a full and complete trial on the merits, the United States District Court entered its judgment and decision sustaining the contentions of the petitioner herein and determining that the Respondent herein had no valid franchise for the operation and maintenance of an electric generating and distributing system in the City of Trenton (R. 131).

The Respondent herein appealed such decision to the United States Circuit Court of Appeals, which Court, after a full consideration of the merits of the case, affirmed the decision of the United States District Court (R. 158). The United States Circuit Court of Appeals in an opinion in which it set forth additional reasons on the basis of which the judgment of the United States District Court was correct, closed its opinion with the following statement (R. 164):

"We think that the decree appealed from was right for the reasons stated, and it is therefore affirmed."

Considering the purport of the statement and the punctuation used by the Court, it can only fairly be determined

that the decree of the District Court was right for the reasons stated in the decree of the District Court and not alone for the reasons stated by the United States Circuit Court of Appeals in its opinion.

Although Respondent herein endeavored to persuade the United States Circuit Court of Appeals to modify its opinion on this particular point (R. 167, R. 168), no further appeal or proceedings to review the decision of the United States Circuit Court of Appeals was prosecuted by the Respondent, and it thus became a final adjudication of these issues.

At the conclusion of that case, demands were made by the City of Trenton, for the Respondent herein to cease its operations in generating and distributing electric energy (R. 5, 6, 34). These demands were ignored by Respondent and Petitioner instituted this original Quo Warranto proceeding in the Supreme Court of Missouri the object and purpose of which was to require the Respondent herein to cease its operations and to remove its equipment and facilities from the public streets and thoroughfares of the City of Trenton (R. 2-10). As is customary in such cases, a Special Commissioner was appointed by the Court to hear the evidence in the case and to make findings of fact and conclusions of law respecting the issues involved (R. 43). Hon. Edgar J. Keating of the Kansas City, Missouri, Bar was appointed by the Court and served as Commissioner (R. 43).

Hearings were held at Trenton, Warrensburg and Kansas City, Missouri, and in New York City (R. 1052). The relevant facts shown by the evidence taken at these hearings are as follows:

On July 22, 1886, the Town of Trenton, then operating under special charter granted by the Legislature

(R. 508) granted a franchise (referred to herein as the "Jones Franchise") to C. D. Jones and Associates to operate a gas and electric plant "or either of them" in the Town of Trenton (R. 301), providing that such electric or gas plant should be in operation by December 1, 1886 (R. 304). Shortly after the grant of the Jones Franchise, Jones constructed and placed in operation a gas plant. He never at any time constructed or placed in operation an electric plant under the Jones Franchise (R. 285-286, 289, 676). The first electric plant in Trenton was constructed and placed in operation by James P. Anderson, who owned the Trenton-Thompson Houston Electric Company. The Trenton-Thompson Houston Company operated an electric plant as assignee of a franchise (R. 192) granted by the Town of Trenton to W. E. Bailey (referred to herein as the "Bailey Franchise"), which franchise was granted on April 2, 1890 (R. 179). The Bailey Franchise was originally for a term of ten years, but by amendment the franchise was extended to a term of twenty years (R. 197), therefore expiring April 2, 1910. The undisputed evidence was that the Trenton-Thompson Houston Electric Company plant, built and operated under the Bailey Franchise, was the first and only electric plant in the City of Trenton; that the plant was started in 1890 (R. 285-286) and was operated by the Trenton-Thompson Houston Electric Company until 1897 (R. 676). Neither Jones nor the Trenton Gas and Electric Light Company (the company organized by Jones) ever operated an electric plant in Trenton under the Jones Franchise (R. 676). The electric company (operating under the Bailey Franchise) acquired the gas company (operating under the Jones Franchise) in 1897, consolidating for the first time under one management the gas and electric properties in Trenton (R. 666-667). It was not

until after April 2, 1910 (the date of the expiration of the Bailey Franchise) that predecessors of Respondent claimed to be operating an electric plant under the Jones Franchise (R. 470). The Respondent herein is the successor to the interests of the respective owners of both the Bailey and the Jones Franchises.

The evidence before the Commissioner showed that the properties of the Respondent were old and deteriorated to the extent that they created a hazard to the public (R. 207, 208, 1003, 1037-1045) and that the City of Trenton was the owner of a new, modern, efficient and well-equipped electric generating plant and distribution system of sufficient capacity to serve all of the users of electricity in the City of Trenton and suburbs and those who might in the future require such service (R. 205).

The Special Commissioner made his report to the Supreme Court of Missouri (R. 1047-1100, inclusive), finding the issues in favor of the Petitioner and recommending the ouster of Respondent. It should be noted that this conclusion was reached by the Commissioner after extensive hearings and the taking of approximately 1,100 pages of evidence. This report was filed on the 6th day of December, 1940 (R. 1047). Thereafter Respondent herein filed certain exceptions to the Report of the Commissioner (R. 1101), and the case was briefed and argued before the Supreme Court of Missouri, *en banc*.

On the 20th day of July, 1943, the Supreme Court of Missouri handed down its decision, refusing to adopt the report of the Commissioner and endeavoring to justify its failure to follow the judgment and decision of the United States Courts in the prior injunction proceedings, found the issues in favor of the Respondent, denied the ouster thus granting to the Respondent herein a perpetual franchise to maintain and operate an electric gener-

ating and distribution system in the City of Trenton, Missouri (R. to).

On the 29th day of July, 1943, Petitioner herein filed its motion for rehearing, setting forth the errors of the Supreme Court of Missouri and pointing out that such judgment and decision violated the rights of Petitioner guaranteed to it under the Federal Constitution (R.).

On the 1st day of November, 1943, the Supreme Court of Missouri, without further comment, overruled Petitioner's motion for rehearing (R.).

Petitioner herein thereby completely exhausted all remedies available to it, save and except this Writ of Certiorari and has proceeded to file this proceeding with this Court within the three months time limit provided for in pertinent Federal law.

B.

Basis of Jurisdiction.

(1) The judgment of the Supreme Court of Missouri determined adversely to Petitioner the right, title, privilege and immunity especially set up and claimed by the Petitioner under the Constitution of the United States, in that it fails to give full faith and credit to the judgments of the United States District Court, for the Western District of Missouri (19 Fed. Supp. 45), and the United States Circuit Court of Appeals, Eighth Circuit (95 F. 2d 1), in the cases of *Missouri Public Service Corporation v. Fairbanks, Morse & Co.* and *the City of Trenton et al.*, as guaranteed Petitioner by the provisions of Section 1 of Article IV of the Constitution of the United States.

(2) The judgment of the Supreme Court of Missouri determined adversely to Petitioner the right, title,

privilege and immunity especially set up and claimed by Petitioner under the Constitution of the United States, in that it impairs the obligation of contract of Petitioner guaranteed Petitioner by the provisions of Section 10 of Article I of the Constitution of the United States.

(3) The judgment of the Supreme Court of Missouri determined adversely to Petitioner the right, title, privilege and immunity especially set up and claimed by Petitioner under the Constitution of the United States, in that it deprives Petitioner of property without due process of law guaranteed Petitioner by the provisions of the V and XIV Amendments to the Constitution of the United States.

(4) The jurisdiction of this Court is urged under Section 237 of the Judicial Code, as last amended by an Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54 (U. S. C. A., Title 28, Sec. 344 and particularly Sec. 344 (b) thereof).

C.

Questions Presented.

Petitioner respectfully urges the following questions for the consideration of this Court:

1. (a) Did not the judgment of the United States District Court, for the Western District of Missouri (19 Fed. Supp. 45), and the judgment of the United States Circuit Court of Appeals, Eighth Circuit (95 F. 2d 1), between the parties hereto, finally and conclusively determine adversely to the Respondent, the validity of the claimed franchise for the establishment, maintenance and operation of an electric generating plant and distribution system?

(b) Was not the Supreme Court of Missouri required to recognize the judgments referred to in Para-

graph 1 (a) hereof as finally and conclusively determining the issue of the validity of the claimed franchise in the instant case, under the full faith and credit clause of the Federal Constitution? (Section 1, Article IV, Constitution of the United States.)

2. (a) Has not the State of Missouri, by the adoption of the common law and by a long line of decisions of the Supreme and Appellate Courts, established the law of Missouri to be that municipal grants of franchises to private parties are to be strictly construed and that doubtful points shall be resolved against the grantee?

(b) Has not this construction become so well established in Missouri law that it becomes a part of every franchise agreement entered into and thus becomes a part of the contract between the Petitioner and the Respondent?

(c) Has not the Supreme Court of Missouri, by its decision in this case, entirely ignoring this established law and the fact that it becomes a part of the franchise agreement impaired the obligation of contract of Petitioner guaranteed Petitioner by Section 10, Article I of the Constitution of the United States?

(d) Has not the Supreme Court of Missouri by its decision in this case, entirely ignoring this established law of Missouri and without over-ruling the prior decisions establishing this principle of law, deprived Petitioner of property without due process of law, in violation of the V and XIV Amendments to the Constitution of the United States?

3. (a) Has not the State of Missouri, by the adoption of the common law and by a long line of decisions of the Supreme and Appellate courts, established the law of Missouri to be that legislative delegations of authority to municipalities are to be strictly construed?

(b) Has not the Supreme Court of Missouri by its decision in this case entirely ignored the established law of Missouri and the fact that it became part of the franchise agreement impaired the obligation of contract of Petitioner guaranteed Petitioner by Section 10, Article I of the Constitution of the United States?

(c) Has not the Supreme Court of Missouri, by its decisions in this case, entirely ignoring the established law of Missouri and without over-ruling the prior decisions establishing this principle of law, deprived Petitioner of its property without due process of law, in violation of the V and XIV Amendments to the Constitution of the United States?

D.

Reasons Relied on for the Allowance of the Writ.

(1) Section 1 of Article IV of the Federal Constitution provides:

"Full faith and credit shall be given in each State to the * * * judicial proceedings of every other State
* * *

Petitioner contends that the United States District Court for the Western District of Missouri, and the United States Circuit Court, Eighth Circuit, in a proceeding between the same parties to this action, finally and conclusively determined that the franchise claimed by the Respondent herein, for the erection, maintenance and operation of an electric generating and distribution plant, was void and of no effect; that such decision, from which no appeal was taken or Application for Writ of Certiorari was applied for, determined that the franchise claimed by the Respondent was void and of no effect. The Petitioner urges that such final decisions of the United States Courts were decisions which the Supreme Court of Mis-

souri was required, under the aforementioned section of the Federal Constitution, to recognize and to render its decision in the instant case accordingly. The orderly administration of justice requires that when rights are finally and conclusively determined by a United States Court of competent jurisdiction, that such determination be recognized and applied by all other Courts, including the Supreme Court of Missouri, when considering litigation between the parties and in which the same issue is involved.

(2) The State of Missouri adopted the common law as of the year 1607. Section 645, Revised Statutes of Missouri, 1939. It was well established in common law that any grant of the Sovereign of any special right or privilege is to be strictly construed against the grantee and that there are no intendments to be drawn over and above that which are specifically and clearly set forth in the grant. Blackstone, Part II, page 347. This common law principle was adopted and made the law of Missouri. No legislation has been enacted modifying or limiting the common law as applicable to the point at issue here. It was in full force and effect in Missouri at the time the Jones Franchise Ordinance was adopted. This common law principle has been many times recognized and applied by the Appellate Courts of Missouri. The case of *St. Louis Gas Light Company v. St. Louis Gas, Fuel and Power Company*, 16 Mo. App. 52, 76, applied this principle and since then many other cases have reiterated its application to franchises. *Carroll v. Campbell*, 108 Mo. 550, 559, 17 S. W. 884, 886. The decision in the *St. Louis Gas Light Company* case was rendered June 17, 1884, two years before the franchise ordinance in the instant case was enacted. The latter case was decided in 1891, several years prior to the purchase of the Jones Franchise by the owners of the Bailey Franchise.

It is recognized principle of law, reaffirmed many times by the Courts of Missouri, that legislative enactments are to be read with and construed as a part of the contracts which they affect.

This rule of law, calling for the strict consideration of franchise agreements is so well established in Missouri that it must be recognized that franchise agreements are entered into in the light of such law. The Supreme Court of Missouri in its decision has entirely ignored this principle of law and, in fact, has most liberally construed the franchise agreement in order to sustain its decision.

In order to clearly present to this Court the basis for the foregoing statement, the following statements are made:

(a) Section (1) of the franchise ordinance (R. 301) grants "the privilege of erecting gas and electric light works or either of them." Section (4) (R. 302-303) provides that the grantee "is hereby authorized to construct and maintain gas and electric light works or either of them * * * and to carry on the business of manufacturing gas and electricity or either of them." The words "or either of them" clearly indicates the grantee had three options under the ordinance; first, the grantee might build an electric light and gas works; second, the grantee might build a gas plant; third, the grantee might build an electric plant. The grantee was clearly privileged under the ordinance to exercise any one of these alternatives. Further, under Section (6) of the ordinance (R. 304) he was to commence the construction on or before August 1, 1886, and complete it on or before December 1, 1886. From the facts in this case, it is clear that the grantee exercised the privilege of erecting the gas plant. No effort was ever made at any time to erect

an electric plant. Grantee's failure to do so on or before the date required, to-wit, December 1, 1886, clearly indicates his exercise of the option provided. A reasonable construction of the franchise, let alone a strict construction of the franchise, requires a holding that alternative rights were granted, the option selected was acted upon by the grantee and by so doing the grantee assumed and exercised all the rights and privileges granted under the franchise and such act completely encompassed the privileges and rights which the City of Trenton claimed. The Supreme Court of Missouri in its decision in this case did not even mention this established principle of law, did not comment upon the adoption by this State of the common law and did not purport to overrule the many cases in Missouri establishing this as the law.

(b) Provisions of the franchise ordinance referred to above specifically requires the grantee to erect an electric light works, in the event the grantee exercised that alternative right provided for in the franchise. The grantee nor his successors have never erected an electric light works under the Jones Franchise. Applying the rule of strict construction to this franchise, it is essential that the grantee or his successors deciding to exercise the privilege of operating an electric generating and distribution system must comply with that provision in the franchise ordinance respecting the building of an electric light works. The operation of an electric generating and distribution system, erected under the authority of the Bailey Franchise, cannot possibly satisfy the requirement in the Jones Franchise for the erection of an electric light works. It should be recalled that at the time of the passage of both the Jones and the Bailey Franchise ordinances, there was no provision for the regulation by a public body of either the service or the rates

of a public utility company. The only safeguard the people had against poor and inadequate service and against exorbitant rates was competition between companies. These franchise ordinances must be construed in the light of conditions existing at that time. Likewise, they must be construed in the light of law, which has always been that a valid franchise can only be granted upon the assumption that it will be used for the public benefit in a reasonable time. *State ex inf. v. Light and Development Company of St. Louis*, 246 Mo. 618, 640, 152 S. W. 67, 71; *State ex inf. v. Delmar Jockey Club*, 200 Mo. 34, 69, 92 S. W. 185, 98 S. W. 539.

We respectfully urge that the building of the electric light works was a condition precedent to the maintenance and operation of an electric generating and distribution system under the Jones Franchise, and believe that the Court's construction of the franchise ignoring this factor is clear evidence of its disregard of the rule of strict construction of the franchise agreement which became a part of the agreement itself.

(c) In the foregoing point we have shown the total failure to erect electric light works at any time under the Jones Franchise. Another evidence of the Court's failure to apply the rule of strict construction is found in its failure to recognize that Section (6) of the franchise ordinance required the grantee to proceed with the construction of such facilities and equipment as he expected to operate in the City of Trenton on or before a fixed date, to-wit, December 1, 1886. A strict construction of the franchise agreement requires a holding that the failure to construct electric light works on or before this date forfeited any rights or privileges which the grantee had to erect and operate an electric light works.

(d) In a further respect the Supreme Court of Missouri failed to apply a strict construction of the franchise ordinance. Section (7) of the Bailey Franchise (R. 304) clearly contains a self-operating forfeiture provision. This provision has been most liberally construed in favor of the Respondent. It should be remembered that the owners of the Bailey Franchise purchased the gas plant erected and operated under the Jones Franchise in 1897, eleven years after the passage of the Jones Franchise ordinance. It is clear from a record in this case that until the expiration of the Bailey Franchise under which the electric light works were erected, the Respondent's successors made no claim to be operating the electric generating and distribution system under the Jones Franchise. In other words, electric light works were operated under the Bailey Franchise until 1910, twenty-four years after the passage of the Jones Franchise ordinance. This is supported by the fact that the original Bailey Franchise required the grantee to supply electric service to the city free of charge (R. 180, Sec. 5). In 1906, long after the Jones Franchise and the gas plant had been purchased by Respondent's predecessors, the obligation of Respondent's predecessors to supply such free electric current, provided for in the Bailey Franchise was recognized and reaffirmed (R. 465).

Both under the self-operating clause of the franchise ordinance and under the general law, the Bailey Franchise was forfeited. *Los Angeles Railroad Company v. City of Los Angeles*, 52 Cal. 242, 92 Pac. 490, 125 Am. St. Rep. 54, 15 L. R. A. (N. S.) 1269. Regardless of the fact that twenty-four years after the franchise agreement, the predecessors of Respondent assumed to operate under the Jones Franchise, the subsequent operation could not have revived the forfeited franchise rights which are claimed by Respondent. The Supreme Court of Missouri, in the

case of *State ex rel. Kansas City v. East Fifth Street Railway Company*, 140 Mo. 539, 41 S. W. 955, clearly held that the municipality could not, by a franchise ordinance, contract away the right of the State to forfeit the franchise for non-user. This being the law of Missouri, the actions of the parties, either the grantee or the grantor, could not revive the franchise or prevent the forfeiture from occurring.

Respondent's predecessors clearly planned to revive the franchise, and the Special Commissioner in this case found many evidences of the Respondent's predecessor's plans. For further facts concerning this, we direct the Court's attention to Petitioner's brief filed in support of this petition.

Petitioner in the preceding paragraphs of this subdivision "(2)" has set forth many particulars in which the Supreme Court of Missouri failed and refused to recognize and apply the established law of Missouri, in that franchise agreements are to be strictly construed against the grantee and that whatever is not unequivocally granted is withheld and as that principle, incorporated into the law of Missouri by Section 645, Revised Statutes of Missouri, 1939, became a part of the franchise contract entered into between Petitioner and Respondent and that the decision of the Supreme Court, in failing to recognize this, has impaired the obligation of Petitioner's contract with Respondent.

Petitioner further urges to this Court that the decision of the Supreme Court of Missouri in failing to recognize and apply this well established rule of law has so flagrantly disregarded the established law of Missouri as declared in the statutes and previous decisions of the Courts, so as to constitute a denial to Petitioner of the due process of law guaranteed by the V and XIV Amendments of the Constitution of the United States. As here-

tofore stated the State of Missouri through the enactment of what is now Section 645, Revised Statutes of Missouri, 1939, adopted the common law as of the year 1607. The Supreme Court of Missouri is without power or authority to modify or change this specific legislative enactment. The General Assembly of Missouri is the only authority having the power to change or modify this law and the Supreme Court of Missouri, presuming to exercise this power has deprived your Petitioner of its property without due process of law. It has been held many times that due process of law refers not only to legislative and executive action but to judicial action as well. *Chicago, Burlington and Quincy Railroad Company v. City of Chicago*, 166 U. S. 226; 41 L. Ed. 979, 17 Sup. Ct. Rep. 581. The question of due process of law is a consideration of the result attained in its totality and when clearly and patently unfair and injurious, even though there has been compliance with proceedings which should normally result in a fair and just decision, the due process clause will protect against a patently unjust, unfair and inequitable result. *Raymond v. Chicago Union Traction Company*, 207 U. S. 20, 52 L. Ed. 78, 28 Sup. Ct. Rep. 7.

As in the *Raymond case*, *supra*, so is this case a most exceptional one and its decision is of great importance to a large number of people. Petitioner has a right, under the established judicial system and pursuant to our fundamental system of government, to have the decisions of the Courts based upon well recognized and established principles of law. When a Court so clearly and unequivocally disregards those rules and where such disregard is patent on the face of the record and the opinion, the litigant has been denied due process of law guaranteed to him by the Constitution of the United States. There are no rigid rules which can be applied

to the application of this constitutional provision. This Court has very recently pointed out this fact and the ease with which justice might be frustrated by a straight-jacket application of this constitutional provision. *Betts v. Brady*, 316 U. S. 455, 462, 86 L. Ed. 1595, 1601, 1602, 62 Sup. Ct. Rep. 1252, 1256.

(3) In order for the Supreme Court of Missouri to find that Respondent possesses a valid franchise for the generating and distributing of electricity in the City of Trenton, it decided that the City of Trenton had authority under its special charter to enter into the franchise agreement. In considering the special charter under which the City of Trenton operated it applied a most liberal construction to the provisions of the special charter. In so doing, it impaired the obligation of Petitioner's contract contrary to Section 10, Article I of the Constitution and it deprived Petitioner of its property without due process of law contrary to the V and XIV Amendments. The charter of any municipality necessarily becomes a part of any franchise or agreement entered into insofar as it is pertinent to the question at hand and all municipal agreements and franchises must be considered in the light of the charter provisions. The charter provides no authority under which Petitioner could, in 1886, have granted an electric franchise. The pertinent charter provisions, as considered by the Supreme Court of Missouri are found on pages 517, 519 and 529 of the record. Section 5, Article III, of the charter authorized the council by ordinance to:

"establish, open, abolish, alter, widen, graduate, pave or otherwise improve all streets, avenues, alleys, sidewalks, public grounds and squares, and to provide for the lighting, cleaning and repairing of same."

Section 13, Article III of the charter provides:

"Finally to pass all such ordinances as may be expedient in maintaining the peace, good government, health and welfare of the town."

Section 6, Article VII of the charter provides:

"The council shall have power by ordinance to direct and regulate the working and improving of all streets, avenues, alleys, sewers and drains in said town and provide for the lighting and cleaning of the streets, avenues and alleys."

The Supreme Court of Missouri first relied upon the provisions of Section 6 of Article VII authorizing the council to provide for the lighting of the streets. Even the most liberal construction of this provision could not authorize the granting of an electric franchise under which there was no provision of any kind or character for the lighting of the streets, avenues or alleys with electricity. Section 5 of the Jones Franchise specifically provides for the lighting of the streets by gas (R. 203). This Court has specifically held in construing similar franchise ordinances that a gas franchise and a light franchise are two entirely different things and must be considered separately. *Capital City Light and Fuel Company v. City of Tallahassee*, 186 U. S. 401, 46 L. Ed. 1219, 22 Sup. Ct. Rep. 866. Sole authority cited by the Supreme Court is the case of *State ex rel. Underground Service Co. v. Murphy*, 134 Mo. 548, 31 S. W. 784. The charter of the City of St. Louis, there considered, granted the city authority to regulate "the public use of the street." This is far broader authority than reposed in the City of Trenton under its special charter. Secondly, the Supreme Court of Missouri relied upon Section 13, Article III of the special charter (R. 519) authorizing the passage of ordinances for the peace, good government, health and

welfare of the town. An examination into the pertinent acts of the General Assembly clearly shows that this provision was never intended to authorize the granting of electric franchises.

Section 13 of Article III of the special charter is almost identical with the provisions of Section 1526, Revised Statutes of Missouri, 1889, which authorized cities of third class to enact ordinances "as may be expedient for maintaining the peace, good government and welfare of the city and its trade and commerce." At that time, cities of the third class were only authorized to enter into franchises for gas and water. Sections 951 and 952, Revised Statutes of Missouri, 1879. In 1889, these sections were amended by including the word "electricity," thus authorizing such cities to enter into franchises for electric service. By this act of the Legislature amending these sections it is clear that it was never intended that the provisions of Section 1526, Revised Statutes of Missouri, 1889, authorizing the enactment of ordinances for the peace, good government and welfare of the city were sufficient to authorize municipalities to enter into electric franchises. It necessarily follows then that the Legislature did not intend that the provisions of the special charter of the City of Trenton, Section 13, Article III, which is couched in almost identical terms, be construed to authorize the City of Trenton to enter into electric franchises.

(5) Petitioner recognizes that this Court cannot correct mere errors of law committed by the Supreme Court of Missouri, but the reasons here advanced for the issuance of a Writ of Certiorari in this case clearly show that there has been such a departure from all of the established precedent and such an ignoring of pertinent

and well established rules of law which became a part of the franchise agreement entered into and which Petitioner had a right to rely upon in the making of the franchise contract, as to result in the Supreme Court of Missouri decision in this case clearly impairing the obligation of the franchise contract. Petitioner herein is not unmindful of the fact that in a number of other cases involving other circumstances this Court has determined that ordinarily the impairment of contract obligations protected by Article I, Section X of our Constitution, is impairment by legislation and not by judicial interpretation. However, there are exceptions. *Muhlker v. New York & Harlem Railroad Company*, 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522. Petitioner respectfully submits that this is a case so flagrant in its disregard of Petitioner's rights as to call for the protection, aid and assistance of this Court.

The importance of this case far transcends the interest of the parties to this suit. There is a vast number of franchises granted throughout the State of Missouri at a time approximating 1886. A number of actions involving the rights of municipalities to erect electric plants and to oust privately owned utilities have been filed. The decision in the instant case sets the pattern which will be followed. Without question power companies are entitled to a fair consideration concerning their asserted rights. However, the public likewise is entitled to like consideration. In the instant case every question of doubt has been resolved in favor of the power company in direct conflict with the statutes of the State of Missouri, and with the court's decisions under them over a period of decades. Only through the exercise by this court of its discretion in the granting of this writ can the established law of Missouri, and the rights afforded by the

Federal Constitution, be effected and preserved not only for Petitioner, but in respect to many other municipalities of Missouri finding themselves in a situation comparable to Petitioner.

Wherefore, your Petitioner prays that a Writ of Certiorari be issued under seal of this Court directed to the Supreme Court of Missouri, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of State of Missouri upon the Information of Roy McKittrick, Attorney General of the State of Missouri, at the Relation of the City of Trenton, Missouri, a municipal corporation, vs. Missouri Public Service Corporation, a corporation, Number 36189, to the end that this cause may be reviewed and determined by this Court as provided for in the statutes of the United States and that the findings and decision of said Supreme Court of Missouri to which Petitioner has objected be reversed by this Court and for such further relief as to this honorable Court may seem proper.

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Of Counsel for Petitioner.





Supreme Court of the United States

OCTOBER TERM, 1943.

No.

STATE OF MISSOURI, UPON THE INFORMATION OF
ROY MCKITTRICK, ATTORNEY GENERAL OF THE
STATE OF MISSOURI, AT THE RELATION OF THE
CITY OF TRENTON, MISSOURI, A
MUNICIPAL CORPORATION,
PETITIONER,

VS.

MISSOURI PUBLIC SERVICE CORPORATION, A
DELAWARE CORPORATION,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri in
State of Missouri, upon the Information of Roy McKittrick,
Attorney General of the State of Missouri, at the Rela-

tion of the City of Trenton, Missouri, a Municipal Corporation, Relator, vs. Missouri Public Service Corporation, a Corporation, Respondent, is reported in 174 S. W. 2d 871 (not yet reported in the official reports).

II.

Statement As to Jurisdiction.

The Petitioner, in support of the jurisdiction of the Court to review the above cause on Writ of Certiorari, respectfully states:

A.

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of the Court is based upon the Judicial Code, Section 237, as last amended by the Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54 (U. S. C. A., Title 28, Sec. 344 and particularly Section 344 (b) thereof), which provides in part as follows:

"It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, * * *."

B.

Date of Decree of State Court.

The judgment and decree sought to be reviewed was rendered on July 20, 1943 (R. ____). Petition for Rehearing was duly filed July 29, 1943 (R. ____). On November 1, 1943, Motion for Rehearing was denied (R.

—). This case was decided by the Supreme Court of Missouri, *en banc*, and is a final judgment, adverse to Petitioner, rendered by the highest court of Missouri.

State ex rel. McGrew Coal Co. v. Ragland, 339 Mo. 452, 97 S. W. 2d 113.

Mower v. Fletcher, 114 U. S. 127, 29 L. Ed. 117, 5 Sup. Ct. Rep. 799.

Gorman v. Washington University, 316 U. S. 98, 86 L. Ed. 1300, 62 Sup. Ct. Rep. 962.

C.

Nature of Case and Ruling Below.

The instant case is the last of approximately nine suits, between these parties involving the construction by Petitioner of a municipal electric plant and the right of Respondent to maintain and operate an electric plant in the City of Trenton, Missouri. The instant case was instituted directly in the Supreme Court of Missouri by Roy McKittrick as Attorney General of Missouri, against the Respondent, on June 8, 1938, to oust Respondent by way of Quo Warranto. The object was to require Respondent to remove its poles, wires and other equipment from the public streets, avenues and alleys of the City of Trenton, it being contended that Respondent owned such equipment and was operating an electric generating and distribution system in the City of Trenton without any right, franchise or privilege granted to the City of Trenton authorizing it to do so.

After some preliminary proceedings, Respondent answered the petition, alleging its ownership and operation of the electric system and contending it was the owner and successor in title to the Jones Franchise granted July 22, 1886, that this was a perpetual franchise and that if Respondent had no franchise, Relator was estopped

to deny Respondent possessed a franchise for a perpetual term.

Petitioner replied, denying the allegations of the answer, and alleged the invalidity of the Jones Franchise was decided by the U. S. Courts in litigation between the parties, that the City of Trenton had no authority to grant an electric franchise, that Respondent had never operated under the Jones Franchise, that Respondent could not be injured by the ouster, because it had made such large and excessive profits out of the operation that it was fully compensated for the investment it had made.

A Special Commissioner, Hon. Edgar J. Keating, a member of the Kansas City, Missouri, Bar, was appointed to hear the evidence and make his report to the Court. He made his report December 6, 1940, and found that the Respondent possessed no franchise to maintain and operate an electric plant in Trenton, and that the Relator was not estopped to deny that Respondent had a Franchise, recommending the ouster of Respondent.

Shortly thereafter, the case was argued and submitted to the Supreme Court of Missouri, *en banc*, which court, more than two years after submission, handed down its decision, rejecting the findings and report of the Special Commissioner and denying the ouster.

The Supreme Court of Missouri held that the litigation in the Federal Courts between the parties did not determine the issue of the validity of the Jones Franchise, notwithstanding Petitioner's contention that such ruling violated the full faith and credit clause of the Federal Constitution. It also ruled that the City of Trenton possessed charter authority to grant the Jones electric Franchise, notwithstanding Petitioner's contention that under long established law such charter authority must be strictly construed and to do otherwise violated the

obligation of contract and due process clauses of the Federal Constitution. By a most liberal construction of the franchise ordinance, the Court (1) construed the ordinance to grant a perpetual electric franchise, which could be exercised by Respondent at any time, (2) denied that (if a franchise was so granted) it had not been forfeited by the self-operating forfeiture clause (Sec. 6) of the Franchise ordinance, (3) determined, in the face of the Special Commissioner's finding (and all the evidence in the record), that Respondent operated under the Jones Franchise from the date (1897) of the purchase of the gas plant and Jones Franchise by the owners of the Bailey Franchise, (4) entirely ignored the statutory adoption of the common law (Section 645, Revised Statutes of Missouri, 1939) and the established law of Missouri, providing that franchises are to be strictly construed and whatever is not unequivocally granted is withheld, notwithstanding Petitioner's contentions that such construction rendered the franchise void; that the established law of Missouri required such franchise to be strictly construed in favor of the grantor; that such law became a part and parcel of the Franchise agreement itself; that the Supreme Court of Missouri by its decision had completely departed from all established law applicable to the case and ignored the law which was a part of the contract itself and thereby impaired the obligation of Relator's Contract with Respondent and deprived Relator of the due process of law, in violation of Section 10, Article I, and the V and XIV Amendments to the Constitution of the United States.

D.

Cases Believed to Sustain Jurisdiction.

This Court has jurisdiction to review any decision wherein the protection of Section 1 of Article IV, Sec-

tion 10, Article I, and the V and XIV Amendments to the Constitution of the United States are sought to preserve the rights of a litigant.

Chicago, Burlington and Quincy Railroad Company v. City of Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581.

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, 28 Sup. Ct. Rep. 7.

Betts v. Brady, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. Rep. 1252.

Muhlker v. New York & Harlem Railroad Company, 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522.

III.

Statement of the Case.

In the interest of brevity, Petitioner does not here make a statement of the case, since a full statement has been given under heading "A" in the Petition for Writ of Certiorari.

IV.

Specification of Errors.

1. The Court erred in failing to hold that the decisions of the Federal Courts between the parties determined the Jones Franchise to be invalid and in failing to give full faith and credit to such decisions, contrary to Section 1, Article IV of the Constitution of the United States.

2. The Court erred in failing to hold that the adoption of the common law and decisions of Missouri appellate courts became a part of the franchise agreement in this case and that accordingly, such franchise agreement should be strictly construed against Respondent and

that such failure impaired the obligation of the franchise contract between Petitioner and Respondent, contrary to Section 10, Article I of the Constitution of the United States.

3. The Court erred in failing to hold that the adoption of the common law and decisions of Missouri appellate courts became a part of the franchise agreement in this case and that accordingly, such franchise agreement should be strictly construed against Respondent and that such failure deprived Petitioner of due process of law, contrary to the V and XIV Amendments to the Constitution of the United States.

4. The Court erred in failing to hold that the adoption of the common law and decisions of the Appellate Courts required a strict construction of the Charter of the City of Trenton, Missouri, and in failing to apply this well established principle, deprived Petitioner of due process of law, contrary to the V and XIV Amendments to the Constitution of the United States.

5. The Court erred in its decision and judgment so totally and patently to recognize the applicable statutes and many decisions of Missouri, requiring a decision and judgment in Relator's favor so as to deprive Petitioner of its property without due process of law, contrary to the V and XIV Amendments to the Constitution of the United States.

V.

Summary of Argument.

A.

United States Courts in litigation between parties to this proceeding determined the Jones Franchise invalid. The failure of the Supreme Court of Missouri to recog-

nize this determination by the Federal Courts violated the full faith and credit clause, Section 1, Article IV of the Constitution of the United States.

Missouri Public Service Corporation v. Fairbanks, Morse & Co. and the City of Trenton et al.,
19 Fed. Supp. 45, 95 F. 2d 1.

Russell v. Russell, 134 Fed. 840.

Simmonds v. Norwich Union Indemnity Company,
73 F. 2d 412.

Southern Pacific R. R. Co. v. United States, 168
U. S. 1, 42 L. Ed. 355, 18 Sup. Ct. Rep. 18.

Baker v. Cummings, 181 U. S. 117, 45 L. Ed. 776,
21 Sup. Ct. Rep. 578.

15 Ruling Case Law 927, Section 405.

Supreme Lodge K. P. v. Meyer, 265 U. S. 30,
68 L. Ed. 885, 44 Sup. Ct. Rep. 432.

B.

The decision of the Supreme Court of Missouri impairs the obligation of Petitioner's franchise contract with the Respondent contrary to Section 10, Article I of the Constitution of the United States, and deprives Petitioner of property without due process of law, contrary to the provisions of the V and XIV Amendments to the Constitution of the United States.

Section 645, Revised Statutes of Missouri, 1939.
Blackstone, Part II, page 347.

Stourbridge Canal Company v. Wheeley, 2 Bar-
newal and Adolphus 791, 109 Eng. Rep. full
reprint 1336.

*St. Louis Gas Light Company v. St. Louis Gas,
Fuel and Power Company*, 16 Mo. App. 52.

Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884.

*State ex rel. Laclede Gas Light Company v. Mur-
phy*, 130 Mo. 10, 31 S. W. 594, affirmed, 170
U. S. 73, 42 L. Ed. 955, 18 Sup. Ct. Rep. 505.

- Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043.
- Memphis Electric Light, Heat and Power Company v. City of Memphis*, 271 Mo. 488, 196 S. W. 1113.
- Blair v. City of Chicago*, 201 U. S. 400, 50 L. Ed. 801, 26 Sup. Ct. Rep. 427.
- Slidell v. Grandjean*, 111 U. S. 412, 28 L. Ed. 321, 4 Sup. Ct. Rep. 475.
- State ex inf. v. Light and Development Company of St. Louis*, 246 Mo. 618, 152 S. W. 67.
- State ex inf. v. Delmar Jockey Club*, 200 Mo. 34, 92 S. W. 185; 98 S. W. 539.
- Capital City Light and Fuel Company v. City of Tallahassee*, 186 U. S. 401, 46 L. Ed. 1219, 22 Sup. Ct. Rep. 866.
- Russell v. Sebastian*, 233 U. S. 195, 58 L. Ed. 912, 34 Sup. Ct. Rep. 517.
- State ex rel. Kansas City v. East Fifth Street Railway Company*, 140 Mo. 539, 41 S. W. 955.
- Gretna v. Bailey*, 141 La. 625, 75 So. 491.
- Nelson v. Garland*, 123 Pa. Super. 257, 187 Atl. 316.
- Muhlker v. New York and Harlem Railroad Company*, 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522.
- Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581.
- Raymond v. Chicago Union T. Company*, 207 U. S. 20, 52 L. Ed. 78, 28 Sup. Ct. Rep. 7.
- Betts v. Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. Rep. 1252.
- Wright v. Milwaukee Electric Company*, 95 Wisc. 29, 69 N. W. 791, 60 Am. St. Rep. 74.
- Los Angeles R. Company v. City of Los Angeles*, 52 Cal. 242, 92 Pac. 490, 125 Am. St. Rep. 54, 15 L. R. A. (N. S.) 1269.

VI.

Argument.

A.

The Respondent herein filed an injunction suit in the United States District Court several years ago to enjoin the City of Trenton from building a municipal electric generating and distribution plant. The City of Trenton defended that action alleging the invalidity of the Jones Franchise. This contention was sustained by the United States District Court and the injunction proceeding dismissed (R. 131). The United States Circuit Court of Appeals, Eighth Circuit, affirmed the judgment of the District Court (R. 157). The United States Circuit Court of Appeals closed its opinion (R. 164) stating:

"We think that the decree appealed from was right for the reasons stated, and it is therefore affirmed."

This statement by the United States Circuit Court of Appeals was so worded as to reflect the ultimate judgment and decision of that Court. When fairly interpreted it can only mean that the decree was right for the reason stated in the decree of the District Court and not alone for the reason stated by the United States Circuit Court of Appeals in its opinion. The terminology used and the location of the comma after the word "stated" connects the phrase "for the reasons stated" directly with the "decree" of the District Court. Petitioner's construction of the Circuit Court of Appeals' opinion is consistent with Respondent's former position, as Respondent filed a motion to modify opinion (R. 168) stating:

"This court on appeal has held that whether the appellant had a franchise or not it had a right to

maintain the action, but the opinion of this court affirms the decree of the district court.

"A controversy still exists between the appellant and the City of Trenton concerning the validity of its franchise, and the said city has notified the appellant that it expects to institute legal action to oust it from said city on account of the alleged fact that appellant's franchise is invalid.

"Under the opinion there is room for a contention by the respondent in subsequent actions that by the affirmance of the decree of the district court the decision of the district court that the appellant's franchise is invalid would be *res judicata* between the parties. An expression to that effect is to be found in the opinion of this court in *Simmonds v. Norwich Union Indemnity Company*, 73 F. 2d 412, l. c. 416, and in the case of *Russell et al. v. Russell*, 134 Fed. 840, and *Oglesby v. Attroll et al.*, 20 Fed. 570."

The Circuit Court of Appeals refused to modify its opinion in any respect (Abs. 169-170), thus clearly indicating the correctness of Petitioner's construction of that opinion. Respondent herein should not be permitted to change its position in respect to this matter. Petitioner earnestly asserts that the issue of the validity of the Jones Franchise was finally disposed of in the litigation in the Federal Courts. In the case of *Simmonds v. Norwich Union Indemnity Co.*, 73 F. 2d 412, 416, citing the case of *Russell v. Russell*, 134 Fed. 840, the United States Circuit Court of Appeals, Eighth Circuit, stated:

"A question expressly determined by a court of equity, whose decree is affirmed on appeal, is *res judicata* between the parties, although such question was not considered by the appellate court, whose affirmance was based on other grounds."

In the case of *Southern Pacific Railway Co. v. U. S.*, 168 U. S. 1, 48, 42 L. Ed. 355, 377, 18 Sup. Ct. Rep. 18, 27, stated:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In the case of *Baker v. Cummings*, 181 U. S. 117, 124, 45 L. Ed. 776, 780, 21 Sup. Ct. Rep. 578, 581, laid down the following rule:

"The mandate from this court in that case, which by stipulation of counsel has been included in the record herein, sets forth our decree, which reversed the decree of the court of appeals with costs, and ordered that the cause be remanded to that court with directions to set aside the decree of the Supreme Court of the District of Columbia, and to remand the cause to that court with instructions to dismiss the bill. There was added the usual formula directing that such further proceedings be had in the cause in conformity with the opinion and decree of this court as ought to be had, etc. The proceedings, however, which were thus directed to be taken, were simply to reverse the judgment of the lower court and to dismiss the bill. It was not a conditional dismissal, without prejudice, or words to that effect, but a general one. A dismissal of the bill under such directions is presumed to be upon the merits, unless it be otherwise stated in the decree of dismissal. *Walden v. Bodley*, 14 Pet. 156, 161, 10 L. Ed. 398, 400; *Hughes v. United States*, 4 Wall. 232, 237, 18 L. Ed. 303, 305; *Durant v. Essex Co.*, 7 Wall. 107, 19 L. Ed. 154; *Bigelow v. Winsor*, 1 Gray. 299, 301; *Coop. Eq. Pl.* 270; 1 *Herman on Estoppel*, Sections 151, 152."

It cannot be successfully argued that there was any condition or contingency set forth by the Circuit Court of Appeals in its order of dismissal of the cause between the parties of this proceeding. It is a clear specific dismissal of their cause of action without a saving clause of any kind or character.

Petitioner respectfully submits that the judgments of the Federal Courts holding the Jones Franchise invalid were binding upon the Supreme Court of Missouri under Section 1, Article IV, of the Constitution of the United States it being recognized that the judgment of the Federal Court is a judgment of a State Court within the meaning of this constitutional provision. 15 Ruling Case Law 927, Section 405.

B.

The decision of the Supreme Court of Missouri impairs the obligation of Petitioner's contract with Respondent, in violation of Section 10, Article I, of the Constitution of the United States. The State of Missouri by the enactment of what is now Section 645, Revised Statutes of Missouri, 1939, adopted the common law as of the year 1607 and that law became a part and parcel of each contract which it affected. Under the common law, franchise agreements were strictly construed against the grantee. In Blackstone, Part II, page 347, we find:

"A grant made by the King, at the suit of the grantee shall be taken most beneficially for the King and against the party * * * but the King's grant shall not inure to any other intent than that which is precisely expressed in the grant."

This principle has been recognized and applies in many early English cases. One of the more frequently quoted cases being that of *Stourbridge Canal Company v.*

Wheeley, 2 Barnewal and Adolphus 791, 793, 109 Eng. Reports, full reprint, 1336, 1337, wherein the following will be found:

"The canal having been made under the provisions of an act of Parliament, the rights of the plaintiff are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases is now firmly established to be this—that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing which is not clearly given to them by the Act. This rule is laid down in distinct terms by the Court in the case of *The Hull Dock Company (The Dock Company of Kingston on Hull v. La Marche*, 8 B. & C. 51) where some previous authorities are cited; and it was also acted upon in the case of the *Leeds & Liverpool Canal Company v. Hustler* (1 B. & C. 424). Adopting this rule we are to decide whether a right to demand for the use of this part of the canal, is clearly an ambiguity given to the plaintiff's by this Act of Parliament; and whether it is not." * * *

"But the clause in question is capable of two constructions; one, that those persons who pass through the locks, and therefore pay the rates, and those only, are entitled to navigate any part of the canal or cuts; the other, that all persons are entitled to use it, paying rates when rates are due. The former of these constructions is against the public and in favor of the company, the latter is in favor of the public and against the company (796), and is therefore, according to the rule above laid down, the one which ought to be adopted."

This common law rule adopted pursuant to the above Missouri statute has been recognized and applied time and

again by the Appellate Courts of Missouri. In the case of *St. Louis Gas Light Company v. St. Louis Gas, Fuel and Power Company*, 16 Mo. App. 52, 76, a case decided two years before the granting of the Jones franchise, it is stated:

"An ordinance is shown (number 11,358) adopted by the municipal assembly of the City of St. Louis, whereby the defendant has acquired 'the right and privilege of laying pipe, with all necessary and proper attachments, connections and fixtures, below the surface of any of the public streets, alleys and highways within the corporate limits of the City of St. Louis, for the purpose of heating public and private buildings,' etc. This gives no more authority to lay pipe for the purpose of lighting than for the purpose of conveying water or wine. All such grants out of the State's prerogatives must be strictly construed and nothing may be added by implication."

Later in the case of *Carroll v. Campbell*, 108 Mo. 550, 559, 17 S. W. 884, 886, the Supreme Court of Missouri stated:

"But, while it was competent for the legislature to grant an exclusive privilege of this kind, it was a canon of construction that a grant of such a nature was construed most strongly against the grantee and in favor of the public, and, unless the legislature made the grant exclusive in the charter itself, it would never be held to be so. 'It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.' "

This general statement as to the existing laws was affirmed in many later cases of our Appellate Courts. *State ex rel. Laclede Gas Light Company v. Murphy*, 130 Mo. 10, 24, 25, 31 S. W. 594, 598, affirmed 170 U. S. 78, 42 L. Ed. 955, 18 Sup. Ct. Rep. 505. The Court cited the decision of this Court in the case of *Fanning v. Gregoire*, 16 How. 524, 14 L. Ed. 1043. See the still later case of *Memphis Electric Light, Heat and Power Co. v. City of Memphis*, 271 Mo. 488, 492, 493, 196 S. W. 1113, 1114.

From the foregoing citations and decisions, to say nothing of the many decisions of this Court, it is clear and certain that the common law and the law of Missouri provides that all franchise agreements are to be strictly construed in favor of the State and against the grantee, that nothing passes by implication and that any doubt as to meaning is to be resolved in favor of the State. There is no need for the citation of authority that the established law becomes a part of every public contract and agreement and such contract must be enforced in the light of such law. Applying this law to the franchise agreement in the instant case becomes our next consideration.

In the granting section of the franchise, Section 1 (R. 301), it is provided that the City of Trenton grants to C. D. Jones and associates "the privilege of erecting gas and electric light works or either of them." In Section 4 of the franchise ordinance (R. 302, 303), authorizing the construction of the plants, it is again provided that the grantee "is hereby authorized to construct and maintain gas and electric light works or either of them * * * and to carry on the business of manufacturing gas and electricity or either of them." The addition of the words "or either of them" in the granting section of the franchise clearly indicates that the grantee had three options under the ordinance.

If this is not true, then why were the words "or either of them" used? First, the grantee might build and operate an electric light and gas works. Both of these utilities might have been erected and operated under the first words of the Sections granting the privilege to erect and operate "a gas and electric light works." Under this grant, the holder had the privilege of proceeding without delay to build both a gas plant and an electric plant and by so doing, every reasonable intendment of the franchise would have been met and the grantee would have been in the position of and would have been properly exercising the rights and privileges of erecting, maintaining and operating a gas plant and an electric plant. Second, the grantee had the alternative of constructing and operating a gas plant. This he was clearly privileged to do under the alternative wording of the ordinance authorizing the erection of "either of them" referring to and meaning either a gas plant or an electric plant. Identically, the grantee had a third alternative, which was the construction and operation of an electric plant.

Thus we see that this franchise ordinance was granted in the alternative, there being three courses of action open to the grantee. The grantee exercised the right and privilege possessed by him to do one of the three things provided for in the ordinance. He made his selection, proceeding with the erection and operation of a gas plant. By this action, the grantee completely assumed and exercised the rights and privileges granted under the franchise. The power and authority which the franchise encompassed was by that action completely exercised and exhausted. There remained no rights or privileges not being used and exercised by the grantee.

The franchise ordinance in this case is clearly susceptible of this construction and under the aforemen-

tioned law such construction is required. This case is analogous to the case of *Blair v. City of Chicago*, 201 U. S. 400, 50 L. Ed. 801, 26 Sup. Ct. Rep. 427, wherein this Court had before it legislation and franchises, which, when read together, were equally susceptible of two constructions. First, that the privileges were granted for a period of 25 years, and second, that the privileges had been extended to a total of 99 years. This Court stated (U. S. 471, L. Ed. 830, Sup. Ct. Rep. 444, 445):

“A construction can be given it which would extend all the contracts with the city for the term of ninety-nine years. On the other hand, it can be maintained, with at least equal force, that, notwithstanding the Governor’s view, it affirmed the contracts as made, thus distinctly recognizing the comparatively short term of twenty-five years, for which they expressly stipulated. It must be, therefore, uncertain whether the legislators voted for this act upon one construction or the other. It may be that the very ambiguity of the act was the means of securing its passage. Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them and submitted to the Legislature with a view to obtaining from such body the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed.”

The situation presented in the instant case is remarkably similar to the facts in the Blair case. Here is an ordinance which is clearly susceptible to the construction advanced by the Petitioner; only by the most liberal

construction in favor of the grantee can Petitioner's position be denied. Petitioner's construction tends to protect and preserve the interest of the City and of the people as against the interest of the grantee, who, as stated by this Court in several cases, may be presumed to have drafted the very instrument under which is being claimed such broad and comprehensive privileges. See *Slidell v. Grandjean*, 111 U. S. 412, 438, 28 L. Ed. 321, 330, 4 Sup. Ct. Rep. 475, 487. As opposed to this construction, consider the construction given to the ordinance by the decision of the Supreme Court of Missouri. It is only through the most liberal construction of the franchise ordinance in favor of the grantee, ignoring Section 645, Revised Statutes of Missouri, 1939, that that decision can be sustained. Not only does that construction entirely ignore the principle of strict construction clearly applicable to the case, but it is diametrically opposed to other valid legal principles applicable to this case. The decision ignores entirely the established rule that *service to the public* is of the essence of a franchise agreement. *State ex inf. v. Light & Development Co. of St. Louis*, 246 Mo. 618, 640, 152 S. W. 67, 71.

The decision of the Supreme Court of Missouri presumes to validate a franchise agreement which would permit the grantee to retain the franchise right without exercising it for five or ten or, as in this case, twenty-four years, or possibly in another case fifty years, without the grantee of the franchise, during any of such periods, furnishing the facilities and services contemplated by the agreement. Franchises can only be valid when granted under the agreement at least implied or tacit, that the franchise granted will be used. It is only upon such implied condition that the City has the right and authority to grant the use of the streets. *Light and Development Company case, supra. State ex inf. v. Delmar Jockey*

Club, 220 Mo. 34, 92 S. W. 185, 98 S. W. 539. Thus the Supreme Court of Missouri by its decision herein has determined that the Jones Franchise was intentionally drafted so that the utility could furnish electric service to the city and to its inhabitants at any time or never. This necessarily follows from the holding of the Court that the erection of the gas plant satisfied the conditions of the ordinance. Therefore the city could not compel the company to erect and operate an electric plant or take any action against the grantee to obtain electric service for the city and its inhabitants. Under all fundamental law applicable to franchises, the purported franchise, as construed by the Supreme Court of Missouri in the instant case, is absolutely void. A city council cannot grant a franchise to a grantee without any contemplation that the service to be rendered would be furnished within a reasonable time. A community cannot be bound by a franchise in which there is no obligation on the part of the grantee to furnish the service or facility. Under the authorities heretofore pointed out, authorities in the State of Missouri, to say nothing of the many decisions of this Court on this subject, no municipal authority has the power to bind the city to any grantee, giving such a right and privilege.

The Supreme Court of Missouri seeks to validate its action upon the theory that the construction and operation of the gas works satisfied the conditions contained in the ordinance and thereby validated and furnished the consideration for the electric franchise. The court relies on the wording of Section 6 (R. 304) of the franchise ordinance which reads "This ordinance is conditioned on the building * * * (of a) gas or electric light works * * * which said gas or electric light works shall be commenced on or before August 1, 1886 * * *." Considered alone,

Section 6 might be construed as the Court has done. It is elementary, however, that all parts of the franchise ordinance must be considered together, and construed as a whole. The Court's construction is not only a liberal construction of Section 6, but does violence to Sections 1 and 4. It is quite clear that a reasonable interpretation of Section 6 in the light of the entire ordinance was meant and intended to cover the three alternatives which were provided for in Sections 1 and 4 of the ordinance. But Section 6, recognizing that the grantee might not choose to build both a gas and electric light works, could only be worded "gas or electric light works" for if the conjunctive had been used, it might have been strictly construed to mean that the building of a gas plant would not satisfy the condition of the ordinance even so far as the gas franchise were concerned. Therefore, Section 6 had to be worded "gas or electric light works" to provide for the alternative rights of the grantee. The conditions were, therefore, alternative. The privilege granted under the franchise to erect a gas works was conditioned upon the building being completed before December 1, 1886, or, if the grantee selected the option of building an electric light works, that construction must be completed on or before December 1, 1886, and necessarily, of course, if the grantee expected to exercise the privilege of building and operating both gas and electric works, the construction of both works would have to be completed before December 1, 1886. Such a construction is the only construction that can be given to this section consistent with the provisions of Sections 1 and 4 of the franchise ordinance and certainly the only construction which is permissible under the established law of strict construction of such contracts.

From a fair reading of the franchise ordinance in the instant case it cannot be said that the city granted to the Respondent the right and privilege to construct and oper-

ate an electric plant at any time in the indefinable future. Such a construction gives to the grantee a valuable right to be exercised at any time without any consideration whatsoever. The consideration for the right to erect and operate a gas plant was the privilege of serving the city and the people thereof with gas light, the consideration for the right to erect and operate an electric light works was the privilege of serving the city and the people thereof with electricity. These two rights are severable and separate. This point has been conclusively determined by the decision of this Court in the case of *Capital City Light and Fuel Company v. City of Tallahassee*, 186 U. S. 401, 46 L. Ed. 1219, 22 Sup. Ct. Rep. 866. Apparently the franchise ordinance in that case was drafted by the same hands that drew the ordinance in the instant case. In the cited case, the franchise ordinance authorized the company to construct "gas and electric light works in the city for the purpose declared in its charter" and that it should "have the right to lay their pipes in any and all streets in said city and in the alleys and lots of the same and to erect such lamp posts or poles or towers as may be necessary or essential for furnishing gas or electric lights in said city * * * and run wires thereto along the streets of said city * * *." Thus, by its terms, the franchise ordinance did not so clearly set forth the alternative rights of the grantee as does the ordinance in the instant case, yet this Court in construing the franchise determined that they were two separate and distinct privileges, l. c.

"The ordinance adopted by the city council has reference to two absolutely separate and distinct privileges although they are contained in one and the same ordinance. One privilege is to use the streets of the city for the purpose of laying down gas mains and other pipes, to distribute gas throughout the city, and to supply consumers with that article. The other is

the right to the use of the streets of the city for the purpose of erecting poles and other things to convey electricity necessary for the lighting purposes. These two privileges are as absolutely separate and distinct as is a privilege to convey by railroad from that by steamboat or by stagecoach. It is seen by the terms of the ordinance that it was not contemplated that these different privileges and plants should be availed of and constructed at the same time, but, on the contrary, the gas plant was to be constructed at once while the obligation to construct the other was left in abeyance and not to be entered upon until consumers enough could be secured to pay 8 per centum per annum on the additional capital required to purchase the machinery for and put in practical operation the lighting by electricity. The two grants might, therefore, have been in two separate ordinances and given to separate persons, firms, or corporations. The operation of one would not interfere with that of the other, except, perhaps, on a question of financial success, but so far as the character of the two grants is concerned, each one is wholly separate and distinct from the other."

From a consideration of all of the sections of this ordinance, it is quite clear that the various grants alternatively provided therein are separable and that the various sections of the ordinance have been so drafted so as to be applicable to any alternative which the grantee might select and proceed with. After what must be presumed full consideration, the Respondent selected the alternative it desired to proceed with. Why it did so is not a matter of present concern, but it is unrealistic to say that there was no substantial anticipation on the part of the parties that an electric light plant was to be built. Certainly that is contrary to reason, for many localities in Missouri had the benefits and advantages of electric plants in 1886, the year this franchise was granted and in fact within four years thereafter other individuals proceeded with the erection

and operation of an electric plant at Trenton. The people of the City of Trenton cannot be assumed to have gratuitously granted rights and privileges included in a franchise, without anticipating a corresponding obligation on the part of the grantee to supply the public service which the franchise contemplated. Rather the franchise must be construed as intending and separately reflecting the intent to grant alternative privileges, the privileges accepted being promptly followed through by the supplying of the services and facilities.

Had the Supreme Court of Missouri recognized the rule of strict construction, it would have arrived at the same conclusion in respect to the franchise in the instant case that was arrived at by this Court in the *Tallahassee case, supra*. Again, only by a most liberal construction of the franchise agreement could the Supreme Court of Missouri have failed to have held that the provisions of the Jones Franchise ordinance were separable and to have held that there was no valid existing franchise for the generating and distribution of electricity.

In another respect, the Supreme Court of Missouri failed to strictly construe the Jones Franchise ordinance. Section 7 (R. 304) is clearly susceptible of a construction (regardless of the construction given to Sections 1 and 4 of the franchise ordinance) that any rights under the Jones Franchise to generate and distribute electricity had been forfeited. This was the determination made by the Special Commissioner appointed by the Supreme Court to hear and determine the case. The Special Commissioner recognized the rule of strict construction and that the franchise ordinance prepared by attorneys representing the utility should be carefully scrutinized and any doubt resolved in favor of the public and against the utility, as was stated by this Court in the case of *Russell v.*

Sebastian, 233 U. S. 195, 205, 58 L. Ed., 912, 921, 34 Sup. Ct. Rep. 517, 520:

"In support of this view, the established and salutary rule is invoked that public grants are to be construed strictly in favor of the public; that ambiguities are to be resolved against the grantee. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 546, 549, 9 L. Ed. 773, 823, 824; *Sliddell v. Grandjean*, 111 U. S. 412, 437, 28 L. Ed. 321, 329, 4 Sup. Ct. Rep. 475; *Detroit Citizens' Street R. Co. v. Detroit R. Co.*, 171 U. S. 48, 54, 43 L. Ed. 67, 71, 18 Sup. Ct. Rep. 732; *Knoxville Water Co. v. Knoxville*, 200 U. S. 34, 50 L. Ed. 359, 26 Sup. Ct. Rep. 224; *Blair v. Chicago*, 201 U. S. 400, 471, 50 L. Ed. 801, 830, 26 Sup. Ct. Rep. 427. It has often been stated, as one of the reasons for the rule, that statutes and ordinances embodying such grants are usually drawn by interested parties, and that it serves to frustrate efforts through the skillful use of words to accomplish purposes which are not apparent upon the face of the enactment. *Dubuque & P. R. Co. v. Litchfield*, 23 How. 66, 88, 16 L. Ed. 500, 509; *Sliddell v. Grandjean*, 111 U. S. 412, 437, 28 L. Ed. 321, 329, 4 Sup. Ct. Rep. 475; *Blair v. Chicago*, 201 U. S. 400, 471, 50 L. Ed. 801, 830, 26 Sup. Ct. Rep. 427."

It is apparent from the record that the scheme of the predecessors of this Respondent was to claim rights and privileges under the Jones Franchise, thereby obviating the necessity of securing new franchises at each 20 year interval, as required by the statutes in effect at the time the Bailey Franchise expired. The object of the power company was apparent. In 1893, the City of Trenton surrendered its Special Charter (R. 506) and was thereafter operating under the General Statutes applicable to cities of the third class. In 1893, an act was passed limiting any franchise granted by such a city to twenty years. Sec.

5846, R. S. of Mo., 1899. Therefore, any renewal of the Bailey Franchise could only be for a term of twenty years. The Special Commissioner found that the power company, during the years following the expiration of the Bailey Franchise, followed a plan to bind the city under the forfeited Jones Franchise (R. 1083, 1084, 1090, 1091). The evidence before the Commissioner shows that the predecessor of the Respondent power company appeared before the City Council of the City of Trenton, after the Bailey Franchise expired, with ordinances prepared not be attorneys for the city but by attorneys for the power company (R. 675-680). The ordinances referred to were in relation to street lighting contracts and by said ordinances the city council mentioned and acknowledged the Jones Franchise and the Bailey Franchise. In support of the position of the City of Trenton that the Jones Franchise conferred no rights upon Respondent to operate an electric plant in Trenton and that even though such rights might have been conferred at the time of the grant, that they had been forfeited by reason of 24 years or more of non-user, and in answer to Respondent that the city had acknowledged by the street lighting ordinances the validity of the Jones Franchise, the Special Commissioner said (R. 1090):

"The fact that the Jones Franchise had been forfeited under the provisions of Section 7 of the Jones Franchise ordinance by at least 11 years' nonuser does not appear to have ever been brought to the Council's attention. No minutes of the council's meetings relate to the fact that such question was presented."

"In this connection it may be considered that the Power Company, a corporation, had perpetual existence and that its officers, attorneys and agents were experts in corporation practices and the law per-

taining to its franchises. On the other hand the membership of the City Council and the City Officers were probably changed biennially. There is nothing of record to show that the mayor and members of the Council were experts of any kind or that any were attorneys. No question as to the validity of the Jones Franchise appears to have been brought to the attention of the Council until just prior to the passage of the ouster ordinance in 1938. Under the foregoing facts it can readily be inferred that the several city councils relying upon the representation of the power company aforesaid that the Jones Franchise was valid and perpetual, and not having had its invalidity brought to their attention, should, during their brief tenure of office, rely upon said representations and adopt the *status quo*. No question concerning the validity of the Jones Franchise appears to have been raised by the City in the several proceedings before the Public Service Commission shown of record. Every act of the City, from 1900 to 1938, appears to have been done without knowledge that the Jones Franchise was forfeited and void. The question of the validity of the Jones Franchise was an involved legal question beyond the capacity of laymen to resolve. It first appears to have been resolved favorably to the city by the opinion of Judge Otis in the injunction action. This favorable decision appears to have been brought to the attention of the City Council and followed by the passage of the ouster ordinance, and, upon non-compliance therewith, by the institution of the present action. Long delay after knowledge does not, therefore, appear."

The Special Commissioner, continued his findings in his report to the Supreme Court of Missouri, saying (R. 1078):

"Nothing appears in the testimony to show that the Trenton Gas and Electric Company ever made any attempt to operate an electric plant until it ac-

quired the plant of the Trenton-Thompson-Houston Company eleven years after the granting of the Jones Franchise, and nothing appears in the testimony to show any objection in its part to the granting of the Thompson-Houston franchise or the construction of its electric plant. While it is true that it operated its gas plant continuously during this eleven year period, it is also true that it stood idly by and permitted the Trenton-Thompson-Houston Company to receive its franchise, make its investment, construct its plant, occupy the streets and serve the people of the town with electricity for a period of seven years before purchasing same. I am of the opinion that under the above facts and under the terms of Section 7 of the Jones Franchise above quoted there was a complete forfeiture of the electric light provisions of the Jones Franchise which became effective without the necessity of court action. By accepting the Jones Franchise, including Section 7, the Trenton Gas & Electric Company agreed to be bound by the self-determining provisions of Section 7, and its failure for at least eleven years, to exercise the power granted to construct an electric light plant must be held to be a complete forfeiture by abandonment and nonuser of their right so to do."

Further evidence is found in the Commissioner's report to the Court of the scheme of the Power Company to revive the Jones Franchise when he said:

"No attempt was made to secure a new franchise upon repeal of the Bailey Franchise, the Power Company apparently electing to take its chances that it could convince the City that the Jones Franchise was still valid or that the City would not wake up to the fact that the Jones Franchise was forfeited. The Council appears to have been ignorant of the fact that the Jones Electric Franchise was forfeited and no longer valid. The law concerning forfeiture of franchises by self-executing provisions of the Franchise

Ordinance was established at that time and must be presumed to have been known to the Power Company and its attorneys. It cannot be assumed that the Council had knowledge of the forfeiture of the Jones Franchise, and notwithstanding such knowledge, intended, by the passage of the lighting ordinance containing the quoted clause, to disregard the public policy of the state respecting perpetual franchises, or that it intended, by this Ordinance, to revivify the corpse of the Jones Electric Franchise and thereby saddle a perpetual franchise on the City. To assume so would be to assume that the members of the council deliberately intended to violate their oaths of office. The presumption of right action by officials should prevail. I am of the opinion that the preparation and presentation of this Ordinance to the Council by the Power Company, through its attorneys, was part of a studied plan to revive the Jones Franchise, with its perpetual term, and thereby avoid the uncertainty and expense of securing new franchises from time to time after the expiration of the Bailey Franchise. Therefore there could have been no misreliance by the Power Company thereon, nor damage arising therefor."

Also at 1084:

"As to the contract ordinances passed after 1900 I am of the opinion that they were a mere continuation of the plan of the Power Company to revive the Jones Franchise and procure some action on the part of the City Council recognizing the validity of the Jones Franchise, and I conclude that they do not estop the City."

Also at 1094:

"I have concluded heretofore that the passage of the five street lighting ordinances attempting to revive the forfeited Jones Franchise occurred long after the forfeiture was effective, and that the City Council

at the time of passage of these ordinances was unaware of the fact that the forfeiture had occurred."

From the quoted statements above, it is clear that the Special Commissioner found that under the self-operating forfeiture clause of the franchise ordinance, the Respondent had no right whatsoever under the franchise agreement. In spite of the fact that the Supreme Court of Missouri held in the case of *State ex rel. Kansas City v. East Fifth Street Railway Company*, 140 Mo. 539, 550, 41 S. W. 955, 957, that:

"The sovereign power of the State to proceed against defendant company by quo warranto for forfeiture of its franchise even at the relation of the city could not be contracted away or in any way abridged by the city."

in the instant case, it ignored the above finding of its Commissioner and permitted Respondent to enjoy the fruits of the franchise, which, under the decisions of that Court, was clearly forfeited. In the franchise in the *East Fifth Street Railway Company Case, supra*, it was provided that a failure to assert a forfeiture within six months after the cause occurred should constitute a waiver of the forfeiture. In holding that such provision was void, the Court stated, (Mo.) 556 S. W. 959:

"If the city had the right to provide by ordinance against the forfeiture of the franchise of defendant on account of the nonuse of its tracks for a period of six months, it had the same right to provide against its forfeiture for an indefinite period and thereby convert the use, which was and could only be public, to a private use."

There was an absolute nonuser of any claimed electric franchise under the Jones Franchise ordinance for a period of 24 years and the fact that electric generating and

distribution system was later operated under the claimed privileges of the Jones Franchise up until the time the action in quo warranto was brought, makes the Respondent but a licensee.

Petitioner respectfully represents to this Court that in every particular, wherein a strict construction of the franchise ordinance could only result in a determination in Petitioner's favor, the Supreme Court of Missouri, disregarding this principle and moving with a most liberal construction of the franchise ordinance, has entirely distorted the franchise ordinance as it should be judged by the established law. When the instant case is compared with other decisions of the Supreme Court of Missouri, wherein, on the basis of strict construction, there has been a refusal to extend or to recognize franchise rights claimed by a grantee it will be found that this is a most flagrant case. Likewise, when the facts in this case are compared with facts in cases decided by this Court, it is found that franchise rights have been denied grantees under much more questionable circumstances. This common law rule of strict construction adopted in Missouri by the enactment of Section 645, Revised Statutes of Missouri, 1939, and applied time and again in other cases by the Supreme Court of Missouri, clearly became a part and parcel of Petitioner's contract with Respondent and to totally disregard this determining factor in the instant case is to deprive Petitioner of its property without due process of law. It cannot be doubted that a franchise right is property. Decisions in every jurisdiction recognizes this to be the case. *Carroll v. Campbell*, 108 Mo. 558, *supra*. That, under the proper circumstances, a municipal corporation is within the protection of the Constitution has been recognized. *Gretna v. Bailey*, 141 La. 625, 75 So. 491. *Nelson v. Garland*, 123 Pa. Super. 257, 187 Atl. 316.

Petitioner respectfully urges that the principle announced in the case of *Muhlker v. New York & Harlem Railroad Co.*, 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522, is applicable to the instant case. In decisions involving other parties and property, the New York Courts had determined that the deed to private property carried with it the right of easement of air and light. This established law had been determined time and time again in exhaustive and carefully considered opinions. The Supreme Court of the State of New York undertook to change this rule of law and to determine that an elevated railway company, building its line in front of abutting property, was not liable for damages to the property owners resulting from the cutting off of light and air. This Court in that case, U. S. 571, Law Ed. 878, Sup. Ct. Rep. 528, stated:

"And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the Courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States, *and we determine for ourselves the existence and extent of such contract.* This is a truism; and where there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of the rights under it."

In this connection it must be recalled by this Court in reviewing the instant case that the common law of England had been adopted by legislative enactment in the State of Missouri and two years before the making of the franchise contract in question, the appropriate Courts of Missouri had ruled upon the construction to be given such contracts. *St. Louis Gas Light Company v. St. Louis*

Gas, Fuel and Power Company, 16 Mo. App. 52. Thus, at the time that the rights of the parties under the franchise agreement were to be measured and determined, the existing law must be read into the contract, becoming a part of it and a subsequent decision of the Courts, ignoring that factor cannot deprive Petitioner of its rights without doing violence to the Federal Constitution.

Likewise, the decision in the instant case, and on the basis of the same authorities, violates the due process clause of the Federal Constitution. It cannot be denied but that the due process clause, the V and XIV Amendments of the Constitution, applies to judicial action, as well as to legislative and executive action. In the case of *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 233, 41 L. Ed. 979, 983, 17 Sup. Ct. Rep. 581, 583, the following statement is to be found:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state—to its legislative, executive, and judicial authorities—and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'"

The fact that Petitioner herein has had an opportunity to present his views is no guarantee that the result attained cannot constitute a violation of the due process clause. As stated by this Court in that case (U. S. 234. L. Ed. 984, Sup. Ct. Rep. 584).

"It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard—met the requirement of due process of law. *U. S. v. Cruikshank*, 92 U. S. 542, 554; *Leeper v. Texas*, 139 U. S. 462, 468, 11 Sup. Ct. Rep. 577. But a state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the fourteenth amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation.' *Darison v. New Orleans*, 96 U. S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."

So in the instant case it is clear that the result which has been obtained in failing to apply Statutes and long standing rules of law to the case as bar is not corrected by the mere fact that Relator has been heard so as to constitute such proceeding due process of law. The result attained in its totality is so clearly and patently unfair

and unlawful that even though established procedure, which should normally result in a fair and just decision, were followed, it is clear that due process of law has not been afforded Petitioner. As stated by this Court in the above cited case, U. S. 236, Law Ed. 984, Sup. Ct. Rep. 585:

"Notice to the owner to appear in some judicial tribunal and show cause why his property should not be taken for public use without compensation would be a mockery of justice. Due process of Law, as applied to judicial proceedings instituted for the taking of private property for public means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

And in conclusion (U. S. 241, L. Ed. 986, Sup. Ct. Rep. 586):

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

In the case of *Raymond v. Chicago Union T. Co.*, 207 U. S. 20, 36, 52 L. Ed. 78, 87, 28 Sup. Ct. Rep. 7, 12, the Court had before it the action of a State Board of Equalization in levying tax assessments pursuant to a writ of mandamus issued by the State Court. The State Board

of Equalization acted pursuant to the final order and judgment of the State Court. This Court held notwithstanding that such action violated the due process clause of the Federal Constitution and stated:

"The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year."

In the above case, although the State Board of Equalization acted on the mandate of a state Court, it was clear that it had failed to equalize the assessments as required by the statute. Likewise, it is equally clear that the Supreme Court of Missouri has ignored the mandate of Section 645, Revised Statutes of Missouri, 1939, adopting the common law in the State of Missouri.

Petitioner respectfully suggests that this case is a most exceptional one, one in which the Supreme Court of Missouri has with apparent impunity disregarded the statute and established law of the State in the decision which has been rendered herein which is of great and lasting importance to many, many people. It is only through an absolute disregard of the established law of Missouri that the decision in this case could be reached. Petitioner respectfully submits that when a Court decision so clearly and unequivocally ignores and disregards the established law, that such litigant has been denied the due process of law as guaranteed him by the Constitution of the United States.

There are no rigid rules which can be applied to the application of the due process clause of the Federal Con-

stitution. It is a fluid and leavening provision to be applied to the facts in each case. It cannot be limited by any fixed concept. In the case of *Betts v. Brady*, 316 U. S. 455, 462, 86 L. Ed. 1595, 1601, 1602, 62 Sup. Ct. Rep. 1252, 1256, this Court has stated:

"Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against State action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."

As in that case, so in the instant case. The application of the constitutional provision is to be made on the basis of a fair appraisal of the totality of facts in a given case. Certainly the instant case is a denial of fundamental fairness, shocking to the universal sense of justice. The instant case is not to be confused with those decisions of this Court wherein a review by this Court has been sought of a decision of the Supreme Court of a State wherein, for the first time a State Court has passed upon and established the law in respect to a given set of circumstances. Were this the case, we would not presume to present it to this Court.

We wish to lastly argue another patent refusal of the Supreme Court of Missouri to apply the established rule of strict construction pertinent to the issues in this case.

The Supreme Court of Missouri in its decision first relies upon the provisions of Section 6 of Article VII of the charter of the Town of Trenton (R. 529), authorizing the City Council to provide for the lighting of the streets, avenues and alleys as being a sufficient delegation of legislative authority to empower Petitioner to enter into the franchise agreement in this case. A most liberal construction of this provision cannot authorize the granting of an electric franchise under which there is no provision of any kind or character for the lighting of the streets, avenues or alleys with electricity. Section 5 of the Jones Franchise specifically provides for the lighting of the streets by gas (R. 203). How it is possible to construe this provision as authorizing the city to enter into an electric franchise, which has no relation or bearing to the lighting of the streets, avenues or alleys is beyond comprehension. The sole authority cited by the Supreme Court of Missouri is the case of *State ex rel. Underground Service Co. v. Murphy*, 134 Mo. 548, 31 S. W. 784. In this case, the Supreme Court of Missouri considered the charter of the City of St. Louis which provided that the city had the power to regulate "the public use of the streets." The public use of the streets might well be construed to cover every reasonable use to which the streets could be put in the public interest. It might therefore contemplate the use of the public streets for the erection of poles and the stringing of wires to supply the inhabitants of the city and the city itself with electric energy. The charter of the City of Trenton however makes no reference to the public use of the streets but simply authorizes appropri-

ate action by the council to provide *for the lighting of the streets*. A franchise ordinance wholly silent as to the lighting of the streets cannot be sustained as within the legislative grant of authority.

As a secondary matter, the Court based its decision as to the sufficiency of the charter of the Town of Trenton to authorize the granting of a perpetual electric franchise on the provisions of Section 13, Article III of the charter (R. 519) authorizing the council to pass ordinances expedient for the peace, good government, health and welfare of the town. A review of the legislative history of grants of authority to municipalities of Missouri clearly indicates that there was no such intention on the part of the Legislature that such a provision should encompass power to grant an electric franchise. This is certain from a review of the pertinent statutes of that day. Sections 951 and 952, Revised Statutes of Missouri, 1879, authorized cities of the third class to enter into franchises for gas and water. No authority was given for the making of an electric franchise. At the same time, these two statutes provided only for franchises for gas and water, there was a general statute, Section 1526, Revised Statutes of Missouri, 1889, which authorized cities of the third class to "enact and make all such ordinances by laws, rules and regulations not inconsistent with the laws of the State as may be expedient for maintaining the peace and good government and welfare of the city and its trade and commerce." In the year 1889, in spite of the provisions of Section 1526, the Legislature amended Sections 951 and 952, Revised Statutes of Missouri, 1879, so as to authorize such cities to enter into electric franchises. Sections 2793 and 2794, Revised Statutes of Missouri, 1889. Such amendment would have been wholly unnecessary if the provisions of Section 1526, Revised

Statutes of Missouri, 1889, were sufficiently comprehensive to authorize the granting of electric franchises.

As is readily seen by a fair comparison, Section 1526 Revised Statutes of Missouri, 1889, was substantially the same as Section 13 of Article III of the special charter of the City of Trenton. The only conclusion which can be reached from this is that the provisions of the special charter of the City of Trenton granted by the same body which in 1889 amended Sections 951 and 952, Revised Statutes of Missouri, 1879, never intended or expected Section 13, Article III of the Charter to authorize the City of Trenton to enter into electric franchises.

We respectfully submit that this is not merely an erroneous interpretation of Missouri law but is further evidence of the whole and total disregard of the Supreme Court of Missouri for the application of established principles of law to Petitioner's case.

Petitioner respectfully submits that the case herein presented is a most exceptional and unusual one. It necessarily calls for and is deserving of careful and thorough consideration. Without question, the constitutional provisions relied upon by Petitioner are sufficient to protect against the improper or, may we say, unlawful acts by any branch or department of the State Government. The regularity of the proceeding, on its face, has no bearing upon the validity of the result when tested under the constitutional provisions. This Court will determine for itself whether or not these constitutional requirements have been met. Respondent's claimed franchise is wholly invalid and ineffectual. Petitioner's constitutional rights are violated by the action of the Supreme Court of Missouri holding it valid. Petitioner was and is clearly entitled to the relief sought in the proceeding in the Supreme Court of Missouri. It is entirely possible that a present member of this Court has, many years ago, had occasion

to examine the franchise here under consideration. It appears from the record (R. 673) that at one time, this Justice was a bond-holder in one of Respondent's predecessor companies, and that he, as has this Petitioner, had difficulty in inducing one of Respondent's predecessors to comply with its contracts. It may well be that he satisfied himself as to the validity of this franchise before becoming the owner of such bond. In such case, we know that this occurred when he was a very young man, with far less experience in the law than he now possesses, possibly he was as young as counsel for Petitioner who prepared this brief, and we hope that he may now review this issue with the wisdom and knowledge that can come only from experience, and find genuine merit in the arguments advanced on behalf of Petitioner.

Respectfully submitted,

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MAR 9 1944

CHARLES ELWOOD DEWEY

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 632.

STATE OF MISSOURI UPON THE INFORMATION OF
ROY MCKITTRICK, ATTORNEY GENERAL OF THE
STATE OF MISSOURI, AT THE RELATION OF THE
CITY OF TRENTON, MISSOURI, A MUNICIPAL
CORPORATION, PETITIONER,

VS.

MISSOURI PUBLIC SERVICE CORPORATION, A
DELAWARE CORPORATION, RESPONDENT.

**BRIEF IN OPPOSITION TO PETITION FOR
CERTIORARI.**

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

The Supreme Court of Missouri, *en banc*, without dissent, held valid a perpetual franchise to operate an electric light and power plant in the City of Trenton. It held that the franchise granted by the City of Trenton to C. D. Jones on July 22, 1886, which had been duly as-

signed to the respondent was, under the decisions of the State of Missouri, valid, and that no forfeiture thereof had occurred. The franchise was for both a gas plant and electric plant; the gas plant was constructed in 1886, but operation under the electric branch of the franchise was not begun until 1897, but from 1897 continuously until the present the respondent and its predecessors have operated the electric plant, and this without any question on the part of the State or City of Trenton until the present ouster suit was brought in 1938 following the erection of a municipal plant. For more than forty years no question was raised by the City of Trenton or by the State as to the validity of the electric franchise or the right to operate thereunder. The Supreme Court, following prior decisions and without reversing any prior decision or departing in any way from them, upheld the validity and present effectiveness of the franchise.

It is the law in Missouri that after a *quo warranto* proceeding is brought by the Attorney General the relator is the real party in interest and is in absolute control of the proceeding. It is provided by Sec. 1782, R. S. Mo., 1939, that if any person usurp any franchise the Attorney General shall proceed in *quo warranto* at the relation of any person desiring to prosecute the same, and that when the information has been filed, the same shall not be dismissed without the consent of the person named as relator, but such relator shall have the right to prosecute the same to final judgment. This, the Missouri courts hold, makes the relator the real party in interest, so this action is one by the City of Trenton although in the name of the Attorney General.

The petition for certiorari to this Court sets up three claims as a basis for the issuance of a writ:

1. That the judgment of the Missouri Supreme Court failed to give full faith and credit to the judgment of the United States District Court in another action.

2. That the judgment sustaining the franchise and denying the ouster impairs the obligation of petitioner's contract in violation of Section 10 of Article I of the Constitution, and

3. That such judgment deprived petitioner of property without due process of law contrary to the provisions of the V and XIV Amendments to the Constitution.

To understand the claim of *res judicata* a fuller statement of facts is necessary. In 1937 respondent filed a bill in equity in the United States District Court of Kansas City (R. 47) in which it sought to enjoin the City of Trenton, certain contractors, and purchasers of the bonds of the City of Trenton from the construction of a municipal electric plant in the city on the ground that such a plant would constitute unlawful competition. As a basis of its interest the bill alleged that the respondent was the holder of a franchise, describing the Jones franchise. The validity of the franchise was involved only in connection with the right of the plaintiff in the action to maintain its suit. The District Judge granted a temporary injunction, but held on final hearing that the plaintiff (respondent herein) did not have a right to maintain the suit because the Jones franchise, under which it claimed, had not been ratified by a vote of the people (R. 140). The only conclusion of law which the District Judge made was (R. 143) that the plaintiff had no such property interest as entitled it to relief in equity prayed by it in the proceeding, that there was no jurisdiction in equity to grant the relief prayed by the plaintiff, and the decree (R. 144) dismissed the plaintiff's bill. There was no judgment on

the merits but only a dismissal for lack of interest sufficient to allow the plaintiff therein to maintain the suit. The case was duly appealed to the Circuit Court of Appeals and an opinion in the case was written by Judge Sanborn (R. 158). In the opinion, after a statement of the facts, Judge Sanborn considered a motion to dismiss the appeal filed by the city on the ground that the case, because the plant had been erected, had become moot. He pointed out respondent's objection that such a dismissal might be regarded as an adjudication of the franchise question and declined to dismiss the case as moot, and considered the case on its merits. The opinion outlines the contentions of the appellant (respondent here) that the contracts were void because of the failure to comply with the law in advertising for bids, and (2) that appellant is the holder of a non-exclusive franchise and had the right to maintain the suit; and after citing authority, the opinion held that whether the appellant had a franchise which it claimed or not, it had an interest sufficient to enable it to maintain the action. The opinion did not discuss the validity of the Jones franchise at all, but proceeds to hold that the irregularities in advertising for bids were not prejudicial, and further held that at the time the suit was commenced it was too late for the appellant, either as a tax payer or as a holder of franchise, to question the lawfulness of the contract, and then the opinion closes with the statement: "We think the decree appealed from was right for the reasons stated, and therefore affirmed."

The reasons referred to were the reasons given in the opinion by the Court of Appeals and not those given by the District Judge. The Court of Appeals overruled the District Judge in his holding that the plaintiff therein did not have sufficient interest to maintain the suit, and thereby rendered unnecessary any decision as to the valid-

ity of the Jones franchise. Under the opinion of the Court of Appeals the Jones franchise was not an issue in the case. The Court of Appeals overruled the trial court in its decision that there had been failure to comply with state statutes as to notice, and held that laches prevented the maintaining of the suit.

No claim was asserted before the Supreme Court by the relator with respect to infringement of its rights under the contract clause or the due process clause of the Constitution, but the relator in its motion for a rehearing (R. 1151) sets up in Paragraph 10 that the decision of the Supreme Court in granting to respondent a perpetual franchise has unlawfully deprived the relator of its right to contract, and by determining that such franchise exists, the obligation of a contract has been impaired in violation of Section 10 of Article I of the Constitution.

In Paragraph 12 of said motion (R. 1151) the relator claims to have been deprived of property without due process of law in that the Supreme Court, without consideration of the matter and without lawful authority, had determined that the construction and operation of a gas plant under a purported franchise, constitute a user to generate and distribute electric energy.

The opinion of the Missouri Supreme Court (R. 1128) sets out the Jones franchise in full, discusses the issue of *res judicata* claimed to exist by reason of the Federal District Court opinion, held that the Circuit Court of Appeals considered the case *de novo* on the evidence before the District Court, and that the affirmance by the Circuit Court of Appeals was not a general affirmance nor an affirmance of the opinion below, but was an affirmance for the reasons which it had stated, and that the validity of the Jones franchise was not one of the reasons and consequently the question was not *res judicata*. The opinion

then considers the power of the town council of Trenton in 1886 to grant the franchise, and cites many decisions of not only Missouri courts but of other courts, including this court, and determines that the City of Trenton had the power to grant a perpetual non-exclusive franchise. The opinion then holds that the failure to exercise the right to build an electric plant from 1886, when the gas plant was erected, to 1897 when plaintiff's predecessors in title began the operation of an electric plant, did not operate as an automatic forfeiture of the right under the franchise, and cites many Missouri cases sustaining its construction that there was no forfeiture, and pointing out that the city had never undertaken to declare a forfeiture of the Jones electric franchise.

The petitioner in his brief quotes at great length from the opinion of the special commissioner appointed by the Supreme Court to hear and report the case. It will be found that such report (R. 1047), while binding on no one, expressly ruled the issue of *res judicata* raised by relator against it (R. 1055), and expressly held that the town of Trenton had the power to grant the franchise (R. 1070), and that the franchise was not required to be approved by public vote (R. 1076). Every issue was decided by the commissioner in respondent's favor except the question of automatic forfeiture. The Supreme Court declined to follow the commissioner on this point, and pointed out that he had fallen into an error of fact, and the portions of the opinion of the special commissioner which the relator quotes extensively at pages 48 to 52 of his petition herein were not adopted by the Supreme Court but were expressly disapproved by it.

The conclusion of the District Court that the Jones franchise was invalid was based upon the conclusion that Secs. 951 and 952, R. S. Mo., 1879, required such franchise

to be approved by a vote of the people. The decision of the District Court was concededly wrong. The Supreme Court in its opinion stated (R. 141) that it was not urged that popular approval of the Jones franchise was required at the time it was granted, and stated that no such contention could have been made in view of the Supreme Court rulings in *State ex inf. Chaney v. West Missouri Power Co.*, 313 Mo. 283, 281 S. W. 709, and in the Springfield Water Company case (*State ex rel. City of Springfield v. Springfield Water Co.*, 345 Mo. 6, 131 S. W. 2d 525). In addition to these cases there were two other decisions of the Missouri Supreme Court holding that a franchise granted under Secs. 951 and 952, R. S. Mo., 1879, did not require a ratification at the hands of the voters, and these decisions (*Holland Realty & Power Co. v. City of St. Louis*, 282 Mo. 180, 221 S. W. 51, and *State ex inf. v. Light & Power Co.*, 246 Mo. 653, 152 S. W. 76) were before the Court of Appeals in connection with respondent's appeal in the injunction case.

The holding in the District Court's opinion that the Jones franchise was invalid, and which the relator seeks to invoke as *res judicata*, is conceded to be erroneous in point of law under expressed decisions of the Missouri Supreme Court, and the opinion of the Circuit Court of Appeals expressly shows that it did not desire its opinion to stand as an adjudication on the franchise question (R. 160).

SUMMARY OF ARGUMENT AND SUPPORTING AUTHORITIES.

A.

The decision of Judge Otis in the District Court that the Jones franchise was invalid because of failure to be approved by a vote of the people was not *res judicata*.

1. The appeal in equity resulted in a *de novo* hearing of the cause.

Dodge v. Knowles, 114 U. S. 430.

Kendall v. Ewert, 259 U. S. 139, 42 S. Ct. 444.

Aro Equipment Corp. v. Herring-Wissler Co., (8 C. C. A.) 84 F. 2d 619.

Union Central Life Ins. Co. v. Imsland, (8 C. C. A.) 91 F. 2d 365.

2. The judgment of the District Court was not on the merits and is not *res judicata* except as to such issues as were affirmed by the Court of Appeals, and the invalidity of the Jones franchise was not affirmed.

Henderson v. U. S. Radiator Corp., (10 C. C. A.) 78 F. 2d 674.

Cromwell v. County of Sac, 94 U. S. 351.

United Shoe Machinery Corp. v. U. S., 258 U. S. 451, 42 S. Ct. 363.

Baltimore Steamship Co. v. Phillips, 274 U. S. 316, 47 S. Ct. 600.

Harriman v. Northern Securities Co., 197 U. S. 244, 25 S. Ct. 493.

North Carolina R. Co. v. Story, 268 U. S. 288, 45 S. Ct. 531.

Restatement of the Law, Judgments, Section 69, page 316.

B.

The contract clause of the Constitution (Section 10, Article I) may not be invoked by the relator city.

McCoy v. Union Elevated R. Co., 247 U. S. 354, 38 S. Ct. 504.

Columbia Ry., Gas & Elec. Co. v. State of So. Carolina, 261 U. S. 236, 43 S. Ct. 306.

City of Trenton v. State of New Jersey, 262 U. S. 182, 43 S. Ct. 534.

City of Newark v. State of New Jersey, 262 U. S. 192, 43 S. Ct. 539.

City of New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 12 S. Ct. 142.

C.

The power of a state and its agencies over its municipal corporations is not subject to any restraint under the 14th Amendment of the Constitution.

Cases under B, *supra*.

City of Pawhuska v. Pawhuska Oil & Gas Co., 250 U. S. 394, 39 S. Ct. 526.

Risty v. C., R. I. & P. Ry. Co., 270 U. S. 378, 46 S. Ct. 236.

Tenn. Electric Power Co. v. Tenn. Valley A., 306 U. S. 118, 59 S. Ct. 366.

Cranford Co. v. City of New York, (C. C. A. 2) 38 F. 2d 52.

East Hartford v. Hartford Bridge Co., 10 How. 511, 18 U. S. 483.

D.

The decision of the Missouri Supreme Court as to the validity of the Jones franchise is binding.

Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817.

E.

This court will accept the interpretation of the laws of Missouri relating to the Jones franchise made by Missouri courts.

Madden v. Com. of Ky., 309 U. S. 83, 60 S. Ct. 406.

Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287, 61 S. Ct. 552.

ARGUMENT.

This Court is authorized by Section 344 (b), Title 28, United States Code, to review the final judgment of the highest court of a State wherein a title, right, privilege or immunity is set up or claimed under the Constitution, and it may review the judgment of the Supreme Court of Missouri if it has failed to give full faith and credit to the judicial proceedings of a court of the United States as required by Section 1 of Article IV of the Constitution. The opinion of the Missouri Supreme Court has not violated that provision. The opinion itself is the best defense against the charge because it has carefully considered the claim of the relator that the decision of the District Court in the prior action was *res judicata*.

It will be more convenient to refer to the published reports than to the transcript to consider the opinions of the District Court and of the Circuit Court of Appeals. As stated, the relator brought an action against the City of Trenton and the contractors to enjoin the construction of an electric plant, and a temporary restraining order was issued. The opinion of District Judge Otis granting the temporary injunction is reported under the style of *Missouri Public Service Corporation v. Fairbanks-Morse Company et al.*, 19 F. Supp. 38, in which opinion Judge Otis found that there had not been compliance with the state statute with respect to advertising for bids for the construction of the plant, and assuming that the plaintiff (respondent herein) had a franchise, that it was entitled to a temporary injunction. On final hearing, the opinion being reported in 19 F. Supp. 45, the District Court adopts the findings of fact which are set out in the opinion just

cited, and then considers the question of whether or not the plaintiff has a franchise, and held (l. c. 49) that since the franchise was not submitted to the people for ratification, it was void, and the Court entered formally a conclusion of law that the plaintiff had no such property interest as entitled it to relief in equity, that there was no jurisdiction in equity to grant the relief, and on such conclusion of law the Court dismissed the plaintiff's bill. Thus it will be seen that the District Court did not decide the case on the merits but only on the question of the right of the plaintiff to maintain the suit. As stated, the Court held, in issuing a temporary injunction, that the contracts had not been properly let, and except for the finding of the invalidity of the franchise, the plaintiff would have obtained a decree so that it is clear that the case was not decided on the merits. The case was appealed and the opinion on appeal is reported in 95 F. 2d, p. 1.

Pending the appeal the City of Trenton had completed the erection of its plant and filed a motion in the Circuit Court of Appeals to dismiss the appeal because the case had become moot. The Court of Appeals, pointing out respondent's objection to such dismissal, that such an order might amount to an adjudication as to the validity of the franchise, expressly declined to consider the case as moot. This certainly shows that the Court of Appeals did not intend to adopt the ruling of the District Court on the question. The Appellate Court did not discuss the validity of the franchise, but said:

"We are of the opinion that the appellant, whether it had the franchise which it claims or not, had an interest sufficient to enable it to maintain this suit insofar as it sought to enjoin the threatened competition which it claimed would be unlawful."

This holding by the Court of Appeals certainly set aside the holding of the District Court that the plaintiff could not maintain the suit because its franchise was invalid. Respondent before that Court was asserting that the District Court was wrong in holding that its franchise was invalid because it had not been submitted to a popular vote, and three decisions of the Missouri Supreme Court holding that no such ratification¹ was necessary were called to the attention of the Court of Appeals. They are *State ex inf. Chaney v. West Missouri Power Company*, 313 Mo. 283, 281 S. W. 2d 709; *Holland Realty Power Co. v. City of St. Louis*, 282 Mo. 180, 221 S. W. 51; *State ex inf. v. Light & Power Co.*, 246 Mo. 653, 1. c. 666, 152 S. W. 76. So that it is apparent that the Court of Appeals did not intend to adopt the ruling of the District Court that the franchise was invalid. The opinion proceeds to hold (resort may be made to the opinion for the holding, *National Foundry & Pipe Works, Ltd., v. Oconto City Water Supply Co.*, 183 U. S. 216) that the failure to advertise according to the Missouri Statute was an irregularity only which did not affect the validity of the contract for the erection of the plant (The District Court had held that such failure rendered the contracts invalid). The opinion also held that the plaintiff was guilty of laches (The District Court had so indicated but had not so declared). Then the Court of Appeals said: "We think that the decree appealed from was right for the reasons stated, and it is therefore affirmed." The relator herein seeks to construe this final statement of the Court of Appeals as meaning that it was right for the reasons set up in the District Court's opinion. Obviously this is incorrect, and the reference of the Court of Appeals is to its own reasons. This is so because: first, the Court of Appeals reversed the District Court on the ques-

tion of the right of the plaintiff to maintain the action. The District Court said that because we had no franchise we could not maintain the action. The Court of Appeals said that regardless of the franchise the plaintiff could maintain the suit, so the Court of Appeals reversed the District Court on this point; next, the District Court held that the failure to properly advertise for bids rendered the contracts for the construction of the plant and the purchase of materials invalid, but the Court of Appeals said that these were irregularities which would not affect the validity of the contract; finally, the District Court did not place its dismissal on the ground of laches, while the Court of Appeals expressly places its dismissal thereon. So no other conclusions can be drawn than that the Court of Appeals sustain the order of dismissal for reasons other than the one advanced by the District Court. The affirmance of the order by the Court of Appeals was a conditional affirmance.

The rule is well established in the 8th Circuit that an appeal in equity brings before the Appellate Court the whole record, and the Court is required to examine the case and decide the case *de novo*. (*Aro Equipment Corp. v. Herring-Wissler*, *supra*) and as said by Judge Sanborn in *Union Central Life Ins. Co. v. Imsland*, 91 F. 2d 365: "An appeal in an equity suit invokes a new hearing and decision of the case upon its merits upon the lawful evidence." Such is the rule in this Court (*Dodge v. Knowles*, 114 U. S. 430); and as this Court said in *Kendall v. Ewert*, 259 U. S. 139, in discussing an appeal from an equity case: "It therefore is a final decree, the appeal from which brings, not only the validity of the stipulation for dismissal, but the entire cause, here for such disposition as the justice of the case may require." We therefore assert that the appeal from the decision of the District Court

and the disposition of it by the Circuit Court of Appeals left no part of the decree of the District Court in effect. The judgment of the Court of Appeals affirmed the action of dismissal but on entirely different grounds, so that there is no basis to ~~claim that~~ the opinion of the District Court is *res judicata*.

This situation is covered in the *Restatement of the Law* in the volume entitled "Judgments," Section 69, page 316, wherein, discussing the affirmance of a judgment based upon alternative grounds, it is said:

"b. *Affirmance of a judgment which was based on alternative grounds.* If the judgment of the court of first instance was based upon two alternative grounds, either of which would be sufficient to support the judgment, and the appellate court holds that both of these grounds are sufficient, and accordingly affirms the judgment, the judgment is conclusive as to both grounds in a subsequent action on a different cause of action (See Par. 68, Comment n.).

"If the appellate court determines that one of these grounds is sufficient but that the other is not, and accordingly affirms the judgment, the judgment is conclusive only as to the first ground.

"If the appellate court determines that one of these grounds is sufficient and refuses to consider whether or not the other ground is sufficient, and accordingly affirms the judgment, the judgment is conclusive only as to the first ground."

The leading case on the subject of estoppel by judgment is that of *Cromwell v. County of Sac*, 94 U. S. 351. In that case suit was brought upon coupons attached to bonds issued by a county by a holder before maturity. The county set up a prior judgment holding that the bonds and coupons were invalid in the hands of one not

a holder for value before maturity. This Court held that the case was different and the first judgment was not a bar, and the Court said:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel is another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * *

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

From this decision and many others which are cited in our summary, it must be held that the judgment in the Federal Court case which, as stated, was an action to enjoin the construction of the municipal plant, being

upon a different cause of action from the cause of action set up in the instant ouster case, could not be *res judicata*; and that all that could be claimed is that the judgment in such action operates as an estoppel only as to the points actually determined in the prior action.

Now not only did the Circuit Court of Appeals set aside the judgment and finding of the District Judge with respect to the franchise, but it directly held that whether there was a franchise or not was not a material issue, so that it cannot be claimed that the validity of the franchise was in issue in said action.

The Supreme Court of Missouri, in deciding that the District Court's opinion was not *res judicata*, relied upon the decision in *Cromwell v. County of Sac, supra*, as well as its own decisions, and the opinion of the Missouri Court clearly outlines the facts and correctly states the law. Further, Section 1 of Article IV of the Constitution provides that credit shall be given to the judicial proceedings, not to a part of the judicial proceedings. The judicial proceedings in the Federal Court action included the decision and opinion of the Circuit Court of Appeals.

The petitioner claims that the Missouri Supreme Court in sustaining the validity of respondent's franchise has violated the contract clause and the due process clause of the Constitution. It is difficult to follow the relator's position. In the first place, the City of Trenton is shown to be a municipal corporation of the State of Missouri, and as such it is entirely subject to the control of the legislative and judicial branches of the state government. Relator does not point out any specific constitutional provision of the State of Missouri or statute of the State that gives the city any vested right. It has long been the established policy of the State of Missouri that exclusive franchises may not be granted but that perpetual fran-

chises may be (see *State ex inf. Chaney v. West Mo. Power Co.*, *supra*) and there is no constitutional provision prohibiting perpetual franchises in Missouri. Statutes limiting franchises as to term do not exist with respect to all cities, and did not exist as to any cities before 1893.

With respect to the contract clause of the Constitution, it is to be noted that the Constitution expressly provides that no state may pass any law impairing the obligation of a contract. This constitutional provision does not apply to judicial action. It has been so expressly held. In *McCoy v. Union Elevated R. Co.*, 247 U. S. 354, many decisions are cited in support of the holding therein that the contract clause prohibits legislative, not judicial, action (See also *Columbia Ry., Gas & Elec. Co. v. State of So. Carolina*, 261 U. S. 236).

With respect to the claim that the due process clause has been violated, the same rule is applicable. In *Risty v. C. R. I. & P. Ry. Co.*, 270 U. S. 378, Mr. Justice Stone said: "The power of the State and its agencies over municipal corporations within its territory is not restrained by the provisions of the 14th Amendment." And in *City of Trenton v. State of New Jersey*, 262 U. S. 182, Mr. Justice Butler said: "In none of these cases was any political subdivision held to be protected by the contract clause or the 14th Amendment. This Court has never held that these subdivisions may invoke such restraint upon the power of the State." And citing *East Hartford v. Hartford Bridge Company*, the opinion further says: "The reasons given in the opinion (10 How. 533) support the contention of the State here made that the city cannot possess a contract with the state which may not be changed or regulated by state legislation." Other cases which we have hereinabove cited also support this position.

The petitioner does not cite a single constitutional provision of Missouri or statute which gives it any exclusive right to operate in the City of Trenton. There are none such, so the City of Trenton is not in any position where any right which it has is impaired. Absent the right to be free of competition, it is not in a position to claim, if it could otherwise claim, that the action of the Supreme Court in sustaining the Jones franchise deprived it of any right.

The question is covered by the decision of this Court in *Tenn. Elec. Power Co. v. Tenn. Valley A.*, 306 U. S. 118, wherein, discussing a like claim, this Court said:

"The vice of the position is that neither their charters nor their local franchises involve the grant of a monopoly or render competition illegal. The franchise to exist as a corporation, and to function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition, and affords the corporation no legal cause of complaint by reason of the state's subsequently authorizing another to enter and operate in the same field. The local franchises, while having elements of property, confer no contractual or property right to be free of competition either from individuals, other public utility corporations, or the state or municipality granting the franchise."

The principle is analogous because unless the City of Trenton does have a right to be free from competition it is not in a position to claim that any right has been taken from it under the ruling in the *T. V. A.* case.

The power of a municipal corporation in Missouri was well defined in the case of *State ex rel. v. S. L., K. C. & N. Ry. Co.*, 9 Mo. App. 532, wherein the Court, discussing the powers of such corporations, said:

"Such bodies are creatures of the legislature to such an extent that they hold those franchises which are of a public nature entirely subject to legislative control. Unlike a private corporation, no vested right in the nature of the contract exists in those franchises, and it is competent to the legislature to modify them at pleasure, or to take them wholly away."

This opinion was affirmed in its entirety by the Supreme Court in 79 Mo. 420, and many subsequent cases affirm the doctrine.

The right of the City of Trenton to engage in the electric power business is entirely subject to legislative control. The right of the respondent herein springs from the statutes of Missouri and the charter of the City of Trenton granted by the State. The construction of these statutes by the Missouri courts will, under many decisions of this Court (of which *Madden v. Com. of Ky.*, *supra*, and *Illinois Central R. Co. v. State of Minnesota*, *supra*, are typical) be followed by this Court, and a consideration of the authorities cited therein will show that the Court has followed the established law of the State as outlined by many decisions in the conclusion it reached.

This proceeding is not one for a review of errors which the petition seeks to make it. It complains of the failure of the Missouri Supreme Court to properly apply the law of this State which contention, we think, is not reviewable by this Court.

Erie R. R. Co. v. Tompkins, 304 U. S. 64, holds that the courts of the United States must follow the decisions of the State courts in actions at common law. The decision assailed was one in quo warranto and is an action at common law, and this Court under that case will follow the decisions of the Missouri court.

As we understand the relator's claim, it is that a strict construction of the Jones franchise would have resulted in a holding that the electric portion of the franchise had been abandoned. To review that question is not the function of this Court in this proceeding, but if it were, then the Court would find that many controlling decisions of the Missouri Supreme Court sustain the right of the city to grant a franchise under its charter, and sustain the conclusion of the Court that there was no forfeiture of the electric franchise.

It should be pointed out that, as shown in the opinion of the Missouri Supreme Court, the franchise for both gas and electric plants was granted in 1886, that the only condition of the franchise ordinance was that either gas or electric light works should be completed in 1886, and that in fact the gas plant was constructed that year; that there was no self-enforcing forfeiture clause in the franchise, and that the holders of the franchise in 1897 began to supply the city with electric power under the franchise, and that repeatedly thereafter the city expressly recognized the existence of the Jones electric franchise, and the record is replete with showings that from 1897 until 1938 the city dealt with the holders of the franchise in such a way as to recognize the existence of the electric franchise and to estop it from denying that it was valid and in force, and that for a period of more than forty years the respondent and its predecessors have operated the electric plant in Trenton without their right being questioned, and have during that time built and enlarged the property from a small electric plant to one wherein they have an investment of nearly one-half million dollars in the electric property at Trenton, which the City of Trenton now desires to destroy because it is itself in the electric power business.

We respectfully submit to the Court that the petition filed herein does not make any case for the intervention of this Court, and we pray that the petition be denied.

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Attorneys for Respondent.





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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 632

STATE OF MISSOURI, UPON THE INFORMATION OF ROY
McKITTRICK, ATTORNEY GENERAL OF THE STATE OF MIS-
SOURI, AT THE RELATION OF THE CITY OF TRENTON, MISSOURI,
A MUNICIPAL CORPORATION,

vs.

Petitioner,

MISSOURI PUBLIC SERVICE CORPORATION, A
DELAWARE CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF.

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Respondent.

PETITIONER'S REPLY BRIEF.

We will not burden this Court with an extended reply to Respondent's Brief in Opposition to Petitioner's Application for Writ of Certiorari. We desire, however, to point out to the Court the following matters:

Respondent (Respondent's Brief, pages 2, 21) states that Respondent operated an electric generating system "under the electric franchise" (Jones Franchise) from 1897 on. This clearly is not consistent with the record in the case, as the electric light plant after it was finally built in 1891 under the Bailey Franchise, was operated under *that* franchise until it expired in 1910, and thus 24 years elapsed after the granting of the Jones Franchise before there was any claim made to be operating an electric generating and distribution system under the Jones Franchise. In this connection, we point out that Respondent (Respondent's Brief, page 21) recites that Petitioner is estopped from

denying that the Jones Franchise is valid and in force. This issue was clearly and correctly determined against Respondent in the Commissioner's report (R. 1081-1098, inclusive). The Supreme Court of Missouri avoided a decision on this point. If this Court accepts jurisdiction of this case, it will decide all issues necessary to a complete disposition of the case and we respectfully state that we shall be able to show to this Court that Petitioner is not estopped from denying that Respondent possesses a valid franchise for the operation of an electric generating and distribution system.

In arguing the issue of res judicata and full faith and credit to be given the judgment of the United States Federal Courts, Respondent places great weight upon the fact that the decision in the United States District Court was "no judgment on the merits" but was a dismissal for lack of interest sufficient to allow Respondent to maintain its suit. It is immaterial whether the matter was or was not disposed of "on its merit" in the sense Respondent considers that term. The issue was one which was necessarily passed upon and determined by the District Court in arriving at its judgment. Therefore, it is as an effective determination of that issue as would have occurred had the issue been decided in the course of a trial "on the merits" of the whole lawsuit. Frequently issues of tremendous importance in a case are determined in disposing of a motion prior to trial. Those issues which are necessarily determined in passing upon the motion are as effectively "res judicata" of such issues as when such issues are determined in the actual trial of the suit on its merits.

Respondent has avoided or overlooked the substance of Petitioner's contentions in respect to the violation of the contract clause and the due process clause of the Federal Constitution. Respondent's arguments do not meet the propositions advanced by Petitioner under Points 2 to 5 of the Reasons Relied on for the Allowance of the Writ, pages

11 to 22, inclusive, and Point B of Petitioner's Argument, pages 35 to 62, inclusive. The cases relied on by Respondent, such as *City of Trenton v. State of New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 and *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 18 U. S. 483, deal entirely with legislative action. They are applicable to situations wherein the Legislature has passed an act modifying or changing some rights claimed by the municipality. Such is not the instant case in any fashion and as shown by the cases cited by Petitioner, there are situations where the obligation of contract clause does apply to judicial action notwithstanding Respondent's statements to the contrary on page 18 of its brief.

On Page 19 of Respondent's Brief it is contended that Petitioner does not cite a single constitutional provision of Missouri or statute giving the City of Trenton the exclusive right to operate in the City of Trenton and concludes that as there are none, the City is not in a position to contend that any right which it has, is impaired. Petitioner's contentions cannot be so casually analyzed or summarily brushed aside. Respondent must show that it has a valid existing right to operate in competition with the City of Trenton. As stated in many cases and recently in the case of *People's Transit Co. v. Henshaw et al.*, 20 F. (2d) 87, 90, a decision of the 8th Circuit Court of Appeals (cited with approval in *Frost v. Corporation Commission*, 278 U. S. 515, 521, 49 Sup. Ct. 235, 237, 73 L. Ed. 483, —):

"It is very clear that the operation of buses in violation of the ordinance would directly affect the revenues of appellees. That is a vital property interest to them."

If such a vital property interest has been upheld many times in the interest of a private corporation, how can Respondent contend that such a right is not a valuable property right of the City of Trenton? Clearly the City of Trenton is entitled to the same protection against unwar-

ranted and unauthorized competition directly affecting revenues of its municipal plants.

We entirely agree with the statement on page 20 of Respondent's Brief that the rights of the City of Trenton to engage in the electric power business is subject to legislative control. That, however, is not the issue in the instant case, for no legislative action is complained of.

The case of *Eric R. Co. v. Tompkins*, 304 U. S. 654, 58 Sup. Ct. 817, is entirely with efficacy in this case. The Supreme Court of Missouri's ignoring of Section 645 R. S. Mo. 1939 and its disregard of innumerable decisions of the Appellate Courts of Missouri in liberally construing the Jones Franchise—the subject of this litigation—clearly violate the obligation of contract provision, and the due process of law provision, of the Federal Constitution. The instant case is one which not only warrants but requires the full consideration of this Court and appropriate action, to the end that the entire case may be reviewed by this Court and a fair and just decision rendered.

Respectfully submitted,

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